

Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In

NATHALIE D. MARTIN*

In this Article, Professor Martin challenges traditional notions of bankruptcy court standing and concludes that the current majority view of such standing, which limits participation in bankruptcy cases to persons with pecuniary interests or claims in the debtor, is too narrow. Professor Martin reviews current case law, statutory law, and bankruptcy policy, and asks whether the people who are regularly granted the right to be heard in bankruptcy cases are the same people who are substantially affected by bankruptcy cases. Ultimately, she concludes that limiting standing to persons with pecuniary rights fails to provide a voice to all people substantially affected by bankruptcy cases. In so concluding, she identifies situations in which unique bankruptcy entitlements permit debtors and creditors to shift financial losses to third parties, some of whom are not even parties to the bankruptcy proceeding and who thus have no opportunity to protect their rights in these cases.

Professor Martin goes on to explore the practical ramifications of expanding standing, recognizing that bankruptcy courts may not be well-equipped to address "nonpecuniary" claims. She argues that considering nonpecuniary interests is economically efficient because it preserves existing social, economic, and familial structures. She argues that, because a truly accurate economic analysis must measure not just present dollars, but all things that we value as a society, there really are no such things as "noneconomic" or "nonpecuniary" interests. She further argues that typical Law and Economics models used in bankruptcy underestimate the societal costs of business failure and displacement and assign no value to the human elements of life.

I. INTRODUCTION

Whose business is Chapter 11 anyway? Whose business is it when a huge plant closes its doors and, within weeks or even days, the company is sold to another company that will operate it in another state? Would employees, for

* Abraham L. Freedman Fellow at Temple University School of Law. The Author thanks William Woodward, Jr., Karen Gross, Nancy B. Rapoport, Richard Greenstein, Michael Smith, Stewart Paley, and Michael Andrews for their comments on earlier drafts of this Article, and thanks Alfred Mathewson, Margaret Montoya, and Peter C. Alexander for their insights on the subjects discussed herein. The author also thanks Eric R. Brown, Erik Stanley, and David C. Peters for their tireless work on the footnotes and final drafts of this Article, and Kathleen E. Lyon and the staff of the *Ohio State Law Journal* for their wonderful editorial assistance. Finally, the author thanks Paulette Gonzalez for her excellent secretarial assistance.

example, find this interesting? Would residents of a nursing home be interested to know that as a result of a decision in the nursing home's Chapter 11 case, they would soon need to find other housing? Obviously, these questions reflect other, larger questions. Is Chapter 11 a primarily private matter between a bankruptcy debtor and those parties who hold cognizable bankruptcy claims and causes of action against the debtor? Or does Chapter 11 have broader public and societal implications?

During the 1980s and early 1990s, shortly after Chapter 11 was enacted by Congress, most bankruptcy scholars argued that bankruptcy involved only private financial relationships between finite groups of private parties, and that consequently bankruptcy courts should consider only these private financial matters.¹ Only recently has any scholar suggested that Chapter 11 bankruptcies may have more far-reaching public and societal implications.² These recent suggestions are beginning to power an active debate about the role of Chapter 11 rehabilitation in society.

Regardless of how one answers these questions, no one can deny that bankruptcy reorganizations have played a far larger role in society in recent years than they have in the past.³ Moreover, specific bankruptcy laws give

¹ See Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 184 (1987); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988) (describing the goal of Chapter 11 as determining how to divide the pie among creditors); Hon. Edith H. Jones, *Chapter 11: A Death Penalty for Debtor and Creditor Interests*, 77 CORNELL L. REV. 1088 (1992) (arguing that bankruptcy is a death penalty for all parties because it does not work for debtors and it keeps creditors from being paid); Robert K. Rasmussen, *The Efficiency of Chapter 11*, 8 BANKR. DEV. J. 319 (1991) (arguing that the costs of Chapter 11 are not justified by the small number of successful cases).

² See generally KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997) (discussing broad societal ramifications of bankruptcy cases); see also Donald R. Korobkin, *Rehabilitation Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 725 (1991) (arguing that some scholars define bankruptcy's purpose too narrowly); Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783, 787-89 (1995) (arguing that bankruptcy cases often involve societal interests that are broader than the interests represented in the case); Julie A. Veach, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211 (1997) (discussing consideration of public interests in reorganization cases).

³ Prior to the enactment of Chapter 11 in 1978, bankruptcy courts filled the role of bean counters' arbiter, separating legitimate and illegitimate claims and splitting up the goodies among the deserving. This limited role was developed in cases such as *In re Johns-Manville*, 36 B.R. 473 (Bankr. S.D.N.Y. 1984), *In re Texaco Inc.*, 84 B.R. 893 (Bankr. S.D.N.Y. 1988), *In re Trans World Airlines, Inc.*, 185 B.R. 302 (Bankr. E.D. Mo. 1995), and others in

bankruptcy debtors and creditors rights they would not have outside bankruptcy.⁴ These specific provisions—including limited notice periods, the automatic stay, and certain sale provisions—inadvertently harm certain other interests including, for example, interests of employees, adjoining landowners, and other parties who do not have a strictly economic relationship with the debtor.⁵

One reason that certain interests are inadvertently harmed by Chapter 11 cases is that most bankruptcy courts have allowed only persons with a present economic interest⁶ in the debtor or in the debtor's assets to be heard in

which Chapter 11 relief was sought. This limited role was relatively effective when bankruptcies, especially reorganizations, were anomalous. Because large reorganization cases are more common under the new Code and provide corporate debtors with more entitlements, this limited role is problematic.

Today, consumer bankruptcies are far more common than in the past, while mega-cases are less common than they were a decade ago. *See* Mark Binker, *Bankruptcy Filings Overwhelm Court in Maryland: Caseload Increases from 10,311 in 1990 to 24,327 in 1996*, BALTIMORE SUN, Nov. 2, 1997, at 148 (noting that consumer bankruptcy filings in Maryland are up 33.6% in part because lenders extend more credit to businesses that traditionally would not qualify); *see also* John Accola, *Bankruptcy Bandwagon*, ROCKY MTN. NEWS (Colo.), Nov. 9, 1997, at 1G (noting similar increases across the country, but looking only at statistics for personal bankruptcies); *Bankruptcy Code Needs Tightening*, SAN FRAN. CHRON., Oct. 26, 1997, at 6 (noting that businesses borrow and use credit differently now that credit is so readily available).

⁴ For example, 11 U.S.C. § 547 allows the trustee or debtor in possession to recover a transfer of property made within 90 days of a bankruptcy filing, and 11 U.S.C. § 365(a) allows a debtor to reject any executory contract or unexpired lease that the debtor finds unprofitable. *See In re GP Express Airlines, Inc.*, 200 B.R. 222, 230 (Bankr. D. Neb. 1996). On the other hand, many state law rights remain the same in bankruptcy and, according to some scholars, differences between substantive rights available inside and outside bankruptcy should be minimized. *See* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 827-28 (1987). Otherwise, parties will be encouraged to file for bankruptcy when it is otherwise inefficient for them to do so. *See id.* Needless to say, however, bankruptcy *does* create some substantive rights which can in turn hurt persons outside the case. Although Professor Baird and others can argue that these problems must be dealt with through nonbankruptcy law, these results are caused by unique bankruptcy entitlements and, thus, must be dealt with in bankruptcy and not elsewhere.

⁵ *See* GROSS, *supra* note 2, at 22.

⁶ Economic rights that are presently in existence are pecuniary; future economic rights are not. Under most case law, only present economic rights, or "pecuniary rights," are recognized in bankruptcy. *But see infra* Part II.C.2 (discussing exceptions recognized under existing law). From this point on in this Article, I use the word "nonpecuniary" to express the

bankruptcy cases.⁷ The Bankruptcy Code does not impose this limitation.⁸ Rather, courts themselves have judicially developed this limited approach to bankruptcy court standing.⁹

In this Article, I argue that there is no justification for providing bankruptcy court standing only to persons with current economic interests. I provide three examples of groups of individuals whose noneconomic interests could be adversely affected by a company's bankruptcy: 1) persons who are being involuntarily released from a nursing home or similar facility because the debtor has found more profitable clientele; 2) persons whose jobs are being eliminated through a bankruptcy sale; and 3) persons who live in a neighborhood in which a former restaurant-bar is being sold to a strip joint. Most of these people would not have bankruptcy court standing under the current majority view, and consequently their interests would never be heard in a typical bankruptcy case. I argue that interests such as these should be heard by bankruptcy courts and that standing should be conferred upon anyone with a substantial interest in the bankruptcy case and not merely upon those with a present "financial" interest.¹⁰

This Article also explores the alternative methods of providing a voice to these interests and ultimately concludes that, at a minimum, we should provide standing to these interests to determine how society's interests are being affected by large Chapter 11 cases. Only by determining what these effects are can we learn whether these interests are being harmed, and if so, how best to protect them.

concept of a right that is either not strictly economic or that is economic but not presently in existence.

⁷ See *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 706 (8th Cir. 1979); see also *In re A-1 Trash Pick-up, Inc.*, 57 B.R. 380, 383 (Bankr. E.D. Va. 1989) (holding that the U.S. Trustee has standing).

⁸ See 11 U.S.C. § 1109 (1994). Under § 1109, any "party in interest" has a right to be heard on any issue in a bankruptcy case. *Id.* Because courts narrowly interpret "party-in-interest" to mean a person with a pecuniary interest in the debtor or its assets, however, these courts deny persons without such a financial interest standing. See *In re Hathaway Ranch Partnership*, 116 B.R. 208, 213 (Bankr. C.D. Cal. 1990); see also *In re Farmer*, 786 F.2d 618 (4th Cir. 1986) (holding that a Chapter 7 trustee was not a party in interest because trustee had no financial interest); *In re Kutner*, 3 B.R. 422 (Bankr. N.D. Tex. 1980) (stating that standing requires a pecuniary interest directly affected by the proceeding or a direct financial interest in the estate being administered). But see *infra* Part II.C.2.a (discussing treatment of future asbestos claims).

⁹ See *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 850-51 (Bankr. S.D.N.Y. 1989) (discussing need to limit bankruptcy court standing for prudential reasons).

¹⁰ See GROSS, *supra* note 2, at 228-29.

In Part II of this Article, I discuss whether reorganization can actually benefit society. First, I review a current debate in bankruptcy regarding whether reorganization provides any benefit to society at all. Because some scholars advocate eliminating Chapter 11 entirely, it may seem counterintuitive to expand the reorganization forum. I argue, however, that Chapter 11 serves the Bankruptcy Code's rehabilitative goals. Rather than doing away with Chapter 11, we need to maintain it, while making it more responsible for and accountable to society and its needs. Reorganization is here to stay; it merely needs to be restructured to respond to its larger role in society.

Second, I address Chapter 11 debtors' fiduciary responsibilities in a reorganization, concluding that a corporation's fiduciary responsibilities in Chapter 11 run not only to creditors and stockholders, but also to other interests as well.¹¹ I conclude that recognizing these fiduciary responsibilities supports a broader approach to bankruptcy court standing.

Finally, I analyze the current law with respect to bankruptcy court standing, concluding that the existing statutory standing standard permits courts to consider a greater variety of interests than many courts currently consider, and that changes in society and in the use of bankruptcy require a more expansive notion of standing.

Part III of this Article illustrates noneconomic or future economic interests that can be adversely affected by a Chapter 11 case, and discusses possibilities for considering these interests. First, I offer examples of noneconomic interests for which the persons affected would have no right to be heard under the majority view of standing. These examples illustrate how damaging a very limited view of standing can be and how it can produce unfavorable consequences to innocent people.¹² I examine one of these examples, the American worker's inability to be heard in cases on issues affecting his future employment, and conclude that workers should have statutorily prescribed standing to speak on this issue. I conclude that a failure specifically to provide this standing further exacerbates the significant downward spiral in job status and wages that American workers already are experiencing.

In addition, I discuss the broader ramifications of expanding bankruptcy court standing and consider the options courts ultimately may have in addressing the issues raised by persons holding noneconomic interests. I argue that taking a broader view of standing would be economically efficient and

¹¹ Such interests include those of employees, suppliers, local businesses, and even the community as a whole.

¹² Some of these consequences are actually caused by the bankruptcy system itself, which makes the situation even more unfair.

propose limitations to preclude these nonpecuniary interests from becoming a significant burden on the reorganization process.¹³

Finally, in Part IV of this Article, I conclude that, beyond economic efficiency, it is socially desirable for bankruptcy courts to hear and consider the societal goals discussed in this Article.¹⁴ I conclude that a far greater economic and social waste occurs when this is *not* done, thereby justifying a departure from the limitations imposed by current judicially-created standing law.

II. CAN REORGANIZATION BENEFIT SOCIETY?

Scholars disagree about whether Chapter 11 reorganization can provide any benefit to society at all. Whether it can depends upon the answers to some very fundamental questions. Does Chapter 11 serve any societal goals, and if so, which goals? To whom does a corporate debtor owe a fiduciary responsibility? Upon whom does the bankruptcy proceeding have a significant effect, and of those persons, who has a right to be heard in a bankruptcy case?

A. *Identifying the Contours of Bankruptcy Policy*

"To be or not to be"¹⁵ is the question some scholars are asking about bankruptcy law. The very existence of this area of the law as a separate discipline has recently been called into question.¹⁶ Included in this inquiry is a large-scale attack on Chapter 11 reorganization, which has been criticized as

¹³ These issues include the sale of all or substantially all of a debtor's assets and confirmation of a Chapter 11 plan, among other things.

¹⁴ I ultimately conclude that efficiency and social desirability are equivalent goals because social desirability is efficient.

¹⁵ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

¹⁶ See Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 312-13 (1993); Baird, *supra* note 4, at 824; Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 128 (1986); James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27 (1991) (arguing that bankruptcy law offers little to justify its existence); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1049-50 (1992) (arguing that because equity holders rarely recover under Chapter 11, Chapter 11 should be repealed); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain*, 75 VA. L. REV. 155 (1980) (questioning the incentives created by the current bankruptcy system); Jones, *supra* note 1, at 1089.

wasteful and, in large part, ineffective.¹⁷ In determining whether Chapter 11 reorganization should indeed exist, one must first ask what function this law should serve.¹⁸

The traditional Law and Economics answer to this question is that bankruptcy law should exist solely to "collectivize" debt collection and maximize economic returns to creditors.¹⁹ Advocates of this approach use what has been called a "common pool" analysis, which relies on the hypothesis of a limited, finite pool of available assets²⁰ and a fixed, identifiable number of creditors who assert claims against the common pool.²¹ Under this model, each creditor is seen as exchanging its rights in the debtor's property for payment from the pool.²² Because of this hypothetical asset exchange, every bankruptcy case, regardless of whether it is a reorganization or a liquidation, is perceived as a sale.²³

Current bankruptcy laws, however, were designed to do more than divvy up the assets.²⁴ As Professor Donald Korobkin has noted: "Bankruptcy law's reasons for being can be only as wide or narrow, critical or trivial, as the

¹⁷ See Bebachuk, *supra* note 1, at 780-81 (describing the numerous costs and inefficiencies in the existing Chapter 11 reorganization system); Jones, *supra* note 1, at 1089-92 (arguing, during a speech before The Federalist Society, that everyone involved would be better off without Chapter 11 because it is usually unsuccessful, expensive, and does not preserve asset values).

¹⁸ See Korobkin, *supra* note 2, at 725-26.

¹⁹ *Id.*

²⁰ *Id.* at 727-28; THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW*, 1-6 (1986) (stating that bankruptcy law should be concerned only with maximizing the asset and not with how those assets will be distributed).

²¹ See JACKSON, *supra* note 20, at 30; DOUGLAS BAIRD & THOMAS JACKSON, *CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY* 31-35 (1985).

²² See Korobkin, *supra* note 2, at 727.

²³ See Bebachuk, *supra* note 1, at 776.

²⁴ See Bankruptcy Reform Act of 1978, Report of the Committee on the Judiciary, H.R. REP. NO. 95-595, at 53-62 (Sept. 8, 1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6014-23 (letter from Judge Conrad Cyr responding to congressional request for information about cases with special community impact); *see also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. REP. NO. 93-197, pt. 1, at 72 (Sept. 6, 1973) (discussion of the "overriding community goals and values" in bankruptcy); 124 CONG. REC. 32,392 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 CONG. REC. 33,990 (Oct. 5, 1978) (statement of Sen. DeConcini).

problem in response to which bankruptcy has developed.”²⁵ The policies behind Chapter 11 are consistently and repeatedly rehabilitative.²⁶ Thus, rather than merely distributing assets, the central purpose of Chapter 11 is to reduce the economic effect of financial disaster.²⁷ This is an entirely different measure from maximizing assets.²⁸

²⁵ Korobkin, *supra* note 2, at 725; see also Kathryn R. Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055, 1078 (1994) (stating that the goal of bankruptcy is to distribute the effects of failing businesses).

²⁶ Moreover, Chapter 11 cases are to be converted to a Chapter 7 liquidation only if there is a “continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(1)(1994); see also *In re The Ledges Apartments*, 58 B.R. 84, 87 (Bankr. D. Vt. 1986) (finding an absence of reasonable likelihood of rehabilitation and thus converting the case); see also *C-TC 9th Ave. Partnership v. Norton Co. (In re C-TC 9th Ave. Partnership)*, 113 F.3d 1304, 1308 (2d Cir. 1997) (arguing that a partnership in dissolution can no longer be rehabilitated). Thus, as long as rehabilitation is possible, it is clearly preferable to liquidation.

²⁷ Professor Elizabeth Warren has noted:

Congressional comments on the Bankruptcy Code are liberally sprinkled with discussions of policies to “protect the investing public, protect jobs, and help save troubled businesses,” of concern about the community impact of bankruptcy, and of “the public interest” beyond the interests of the disputing parties. These comments serve as reminders that Congress intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors; they indicate clear recognition of the larger implications of a debtor’s wide-spread default and the consequences of permitting a few creditors to force a business to close.

Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987) (footnotes omitted); see also James W. Bowers, *Groping and Coping in the Shadow of Murphy’s Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097, 2143 (1990) (arguing that maximizing assets alone does not achieve the maximum goals of Chapter 11; even if the assets are maximized, maximum efficiency can only be achieved if bankruptcy losses also are minimized).

²⁸ See Bowers, *supra* note 27, at 2143. Moreover, while maximizing assets is one way to reduce the effects of economic disaster, Chapter 11 does not propose to do this through a sale model. Where possible, values are to be maximized by realizing the “going concern” premium or value for the continuing operation of a business. See Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. REV. 791, 809 (1993) (stating that the “mandatory sale system was the form used in the old equity receiverships”). “Going back to a forced-sale regime would require explaining why the concerns that led to the demise of the equity receivership . . . [would] no longer hold true.” *Id.* This is why the sale model is so unnatural. It appears to have been developed at a time when the current Chapter 11 did not exist, and thus it does not reflect the realities of modern life surrounding Chapter 11. See *id.* In connection with this idea, Professor Tabb quotes Professor Warren as saying, “[t]he

Many Law and Economics scholars fully recognize bankruptcy's rehabilitative function in individual bankruptcy cases,²⁹ but do not consider corporate reorganizations rehabilitative and do not believe that they have any positive impact on society.³⁰ When Professor Karen Gross suggests that bankruptcy cases have large implications for society as a whole, in her essay entitled *Taking Community Interests into Account*,³¹ Judge Schermer dismisses the notion as pure fiction.³² Similarly, three British scholars insist that greater

bankruptcy system matters. It mattered to a 10 billion dollar business like Federated, and it mattered to their 80,000 employees who stayed on the job." *Id.* at 804 (quoting Elizabeth Warren, *The Untenable Case for the Repeal of Chapter 11*, 102 YALE L.J. 437, 478 (1992)). The reality of Chapter 11 in modern life is that "a business is worth more alive than dead." Tabb, *supra* at 804; see also Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333, 365 (1992) ("Although the economic account's method may be suited to solve a purely economic problem, it is entirely unsuited to resolve practical conflicts among diverse and incommensurable values that pervade financial distress.").

²⁹ See, e.g., Korobkin, *supra* note 2, at 724 n.22 ("From the perspective of the economic account, the fresh start policy is 'substantively unrelated to the creditor-oriented distributional rules that give bankruptcy its general shape and complexity.' . . . Nevertheless, proponents of the economic account still recognize the fresh start policy as a 'key policy in bankruptcy law.'") (quoting JACKSON, *supra* note 20, at 225, 227).

³⁰ See, e.g., JACKSON, *supra* note 20, at 1-6; Baird, *supra* note 1, at 184. According to Korobkin, however, a corporation is an enterprise that has a personality, and, like an individual, it can change its personality. A corporation is like an individual debtor, a moral, political, and social actor. See Korobkin, *supra* note 2, at 745; see also GROSS, *supra* note 2, at 98-103 (discussing the many benefits of rehabilitation, including economic and humanitarian benefits); Warren, *supra* note 27, at 787 (discussing the rehabilitative goals of Chapter 11).

³¹ 72 WASH. U. L.Q. 1031, 1039 (1994). As Professor Gross points out, the typical ways Law and Economics addresses concerns about community interests is by ignoring them. Whatever attention is paid to the issue is relegated to "below the line" notes in passing in the footnotes. See *id.* at 1046-47.

³² Judge Schermer never even addresses the underlying issues. See Barry S. Schermer, *Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy—A Modern-Day Tale of Belling the Cat*, 72 WASH. U. L.Q. 1049 (1994). Judge Schermer suggests that, similar to a group of mice that wishes to have a bell put around a cat's neck but does not want to actually do it, community interests cannot be measured and thus are unrealistic to even consider. See *id.* at 1050. He fears that a Pandora's box of interests will be opened, and there will be no way to limit the huge number of potential claims or determine how, if at all, to weigh their claims. See *id.* at 1051. Based on these problems, he concludes that considering these potential interests is pure fiction. See *id.* As discussed in Part III.D., Judge Schermer is incorrect. It is possible to effectively limit the claims that can be heard. In any event, Professor Gross is not afraid of Pandora's box, and in fact sees opening it as part of a necessary process. See GROSS, *supra* note 2, at 197.

social interests should not be promoted through bankruptcy laws but through business subsidies and other mechanisms.³³ Such a suggestion makes far more sense in the more socialist British business environment than under the American model, which disfavors these subsidies as anticapitalist. Indeed, the very need for such an extensive reorganization system flows from American capitalism and its lack of other safety nets.³⁴ In fact, it would be less drastic, and more consistent with American law, to use the American bankruptcy system to minimize large-scale losses, rather than to create business subsidies.³⁵

One common thread in the bankruptcy policies developed from Law and Economics theories is that each policy espouses a single goal as being the purpose of all bankruptcy laws.³⁶ Despite these simple hypotheses, however, there is nothing simple about bankruptcy policy or the societal issues to which it must respond.³⁷ Nor is there one goal in devising a bankruptcy scheme.³⁸ If

³³ See Phillipe Aghion et al., *Improving Bankruptcy Procedures*, 72 WASH. U. L.Q. 849, 852 n.7 (1994) (noting that bankruptcy is the wrong instrument for dealing with external considerations such as maintaining employment in a local community, and that it would be more preferable to have a general employment subsidy to save jobs than to distort bankruptcy procedures).

³⁴ See Warren, *supra* note 27, at 779 (discussing how contract laws can themselves be more strict because bankruptcy provides a method of escaping contractual obligations).

³⁵ See H. VARIAN, MICROECONOMIC ANALYSIS 111-15 (2d ed. 1984).

³⁶ See JACKSON, *supra* note 20, at 32; Bradley & Rosenzweig, *supra* note 16, at 1043. According to Jackson and Baird, that one goal is to collect and distribute assets; I call this the "collectively divide" goal. It is distinguished from state law only because it is a collective, rather than individual, effort. See JACKSON, *supra* note 20, at 31-35; Baird, *supra* note 16, at 130. According to Bradley and Rosenzweig, the single goal in a Chapter 11 reorganization is to maximize returns to shareholders and bondholders. See Bradley & Rosenzweig, *supra* note 16, at 1088-89. Actually, their study limits the goal to maximizing returns to "public" shareholders and bondholders, virtually ignoring all privately-owned enterprises. Yet this goal is inconsistent with many bankruptcy code provisions, including § 1129(b)(2)(B)(ii), which provides that creditors must be paid before shareholders can receive a distribution under the plan. See 11 U.S.C. § 1129(b)(2)(B)(ii) (1994). This "maximize return to investors" goal, the philosophical opposite of the "collectively divide" goal, is but one goal nonetheless. Its narrow nature makes the solution—in their case to the problem of low returns to shareholder and bondholders—equally simple: repeal Chapter 11; after all, it's useless as judged by its sole goal.

³⁷ See Warren, *supra* note 27, at 811. Professor Warren has expressed her view of bankruptcy as "a dirty, complex, elastic, interconnected view . . . from which [she] can neither predict outcomes nor even necessarily fully articulate all the factors relevant to a policy decision." *Id.*; see also Rapoport, *supra* note 2, at 815-16 (explaining that under at least some views of bankruptcy policy, bankruptcy decisions are complicated by a number of ethical and societal issues).

there was, many of the current Bankruptcy Code provisions, which address a huge array of societal concerns, would not exist.³⁹ Moreover, despite scholarly debate about whether there should be a Chapter 11, it seems unlikely that Chapter 11 will be repealed.⁴⁰

This is not to say, however, that Chapter 11's rehabilitative goals should be used to hurt important and legitimate rights of third parties, some of whom are not even a party to the bankruptcy proceeding.⁴¹ To the contrary, Chapter 11's rehabilitative goals run not merely to the reorganizing company, its creditors, and shareholders, but also to third party interests.

B. *Corporate Social Responsibilities in Chapter 11: The Debtor's Role in Recognizing Noneconomic Interests*

Corporations, both inside and outside bankruptcy, gain advantages from legal systems perpetuated by the government and the public.⁴² In exchange for these advantages, corporations should be held responsible and accountable to the public.⁴³ Under the "entity" theory,⁴⁴ a corporation has separate fiduciary

³⁸ See *infra* notes 134-45 and accompanying text (discussing the many Bankruptcy Code provisions that further broad goals other than maximizing returns to creditors); see also Rapoport, *supra* note 2, at 837-43 (discussing the intersection of bankruptcy law with criminal law and environmental law).

³⁹ See *infra* notes 134-45 and accompanying text.

⁴⁰ See Tabb, *supra* note 28, at 862.

⁴¹ See generally Rapoport, *supra* note 2. Professor Rapoport recognizes throughout her article that there can be many unrepresented parties in a typical bankruptcy case.

⁴² See E. Merrick Dodd, Jr., *For Whom Are the Corporate Manager's Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932); Christopher D. Stone, *Corporate Social Responsibility: What it Might Mean If It Were Really to Matter*, 71 IOWA L. REV. 557, 559 (1986).

⁴³ See Dodd, *supra* note 42, at 1148; Stone, *supra* note 42, at 559; John C. Coates, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 873-76 (1989).

⁴⁴ The entity theory describes the corporation as a legal person that is separate and distinct from its shareholders. See David Millon, *Theories of the Corporation*, 201 DUKE L.J. 201, 216 (1990). The corporate entity is considered an artificial creation of the state, and not of private individuals. See *id.* Because the corporation is separate and distinct from its shareholders and was not created by its shareholders but by the state, it owes obligations not just to its shareholders but to others as well. These others could include employees, suppliers, and even the public at large. See *id.* Under this theory of the corporation, the corporation is allowed to consider interests other than those of its shareholders, and is even free to make decisions that might harm its shareholders in order to benefit others. See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1067 (1994).

obligations to other members of the community, including employees, suppliers and even communities as a whole. Under this theory, shareholder profit maximization is not management's sole concern.

While recognition of corporate fiduciary responsibilities is far from universal,⁴⁵ the theory behind recognizing social responsibilities in corporations is simple. A corporation that at least considers the public interest in making decisions is less likely to cause harm to society. Some corporations may even take action that is beneficial to society, and it is difficult to see how this could

⁴⁵ There are many theories of the corporation and the "entity" theories are admittedly a minority view. The Artificial Entity theory views the corporation as a legal person, existing separately from its shareholders. *See* *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636-37 (1819) (describing the corporation as an entity that is an "artificial being, invisible and intangible" and separate from its shareholders); J. ANGELL & S. AMES, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS* AGGREGATE 1 (9th ed. 1870) (describing the corporation as a "body, created by law, . . . for certain purposes, considered as a natural person").

The Natural Entity theory views the corporation as a creation of private initiative rather than state power and as deriving its power from its shareholders. *See* *The Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882) (advocating looking at the corporation as the people that compose it). The Corporate Responsibility theory is an extension of the natural entity theory and views the corporation as having a public obligation to be a good citizen. This view includes the interests of shareholders, employees, and even the public at large. *See* Dodd, *supra* note 42, at 1146; James Boyd White, *How Should We Talk About Corporations? The Language of Economics and of Citizenship*, 94 YALE L.J. 1416, 1418 (1985).

The Shareholder Primacy Aggregate theory argues that the role of the management of the corporation is that of trustee for the shareholders because the corporation is really an aggregate of the shareholders and management. *See* *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end."); Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 CAN.-U.S. L.J. 7, 8 (1988) ("The bedrock principle of U.S. Corporate law remains that maximization of shareholder value is the polestar for managerial decisionmaking.").

The Contractarian or New Economic theory views the corporation as a nexus of contracts. The interrelation of those contracts determines the rights of the various individuals involved. *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972) (analyzing the agency cost perspective of the corporate form); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. Summer 1989, at 99.

The Broad Aggregate theory conceives of the firm as an aggregate of more than just shareholders and management, but also employees and suppliers. *See* Millon, *supra* note 44, at 225-28.

be bad.⁴⁶ Moreover, we are entitled to accountability from corporations, which enjoy power and wealth as a result of limited liability principles and other legal constructs.⁴⁷ Too often, however, such responsibilities are unrecognized or ignored. As one scholar has noted:

[O]ver the last century the corporation has gained an extraordinary legislative and Judicial status, receiving almost the full spectrum of legal rights of an individual. This process completes the inverse of purpose (corporations created to serve the public good) and values: from property rights as a tool to safeguard individual autonomy to property's assumption of (individual) autonomy and the subordination of individual and community to the needs of corporations.⁴⁸

While recognition of corporate fiduciary responsibilities is still somewhat rare, it is not a purely academic phenomenon.⁴⁹ Shareholder constituency statutes, which permit or require corporate directors to consider interests of the corporation's employees, suppliers, creditors, customers, the national economy, and even long-term community and societal goals, have been adopted in more than half of the states.⁵⁰ The rationale behind these statutes is similar to the rationale for recognizing broader interests in bankruptcy:

⁴⁶ For example, consider the corporation that is not required to do so but decides to install an extra antipollution device on a piece of farm equipment. The government is considering making the device mandatory but has not done so. Using this device unquestionably will reduce immediate and even perhaps long-term profits. Yet, as a society, we want to encourage this type of activity.

⁴⁷ Corporations obtain these advantages from the government, which acts as an agent for the public. Thus, corporations should be responsible to the public. See Rachel Geman, *Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 377-78 (1997).

⁴⁸ Richard Healey, *Toward a New Social Accord* 3 (unpublished paper on file with the *Columbia Journal of Law and Social Problems*), cited in Geman, *supra* note 47, at 377-78.

⁴⁹ See Ira M. Millstein, *The Responsible Board*, 52 BUS. LAW. 407 (1997) (claiming that in order to retain their privileges in society, corporations must balance societal interests with the goal of maximizing shareholder profit).

⁵⁰ For catalogues of these statutes, see John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1540-45 (1991) (appendices summarizing 29 statutes); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 n.1 (1992) (listing 28 statutes); Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 194-96 (1991) (listing 28 statutes).

The increasing recognition of the modern corporation's profound effect on the lives of a variety of groups not traditionally within the corporate law structure has the potential to lead corporate law into the next century in a manner more reflective of the role that this type of organization actually plays in our society.⁵¹

Even Wall Street, the bastion of shareholder profit maximization, has acknowledged corporate responsibilities in some form.⁵² According to one Wall Street attorney, corporations must balance the goal of maximizing shareholder profits with the needs of society.⁵³ This is particularly true in the United States, where the government is less involved in addressing social concerns than in many other advanced economies.⁵⁴ Rather than "do gooder" ethical advice, this Wall Street attorney believes that corporate responsibility is simply a reality of America's highly privatized economic system.⁵⁵ Under this view, corporations that fail to recognize their social responsibilities will not be sustainable over the long term.⁵⁶

Of course, many scholars deny that corporations have any social responsibility to the public. To many, the idea places social obligations on entities that are unable to balance the resulting competing goals.⁵⁷ Scholars also

⁵¹ Mitchell, *supra* note 50, at 584. Moreover, corporations are increasingly mobile and control far more wealth than ever before. See Kary L. Moss, *The Privatization of Public Wealth*, 23 FORDHAM URB. L.J. 101, 111 (1995). In fact, more than a quarter of the world's economic activity is generated by the 200 largest corporations, which causes corporations to be "less accountable to workers and communities." *Id.*

⁵² See generally Millstein, *supra* note 49, at 407 (acknowledging, in his role as Wall Street corporate lawyer, that corporations have fiduciary responsibilities to parties other than shareholders).

⁵³ See *id.* at 408.

⁵⁴ See *id.* These social factors are considered "extrinsic" because they fall outside the traditional goal of profit maximization. Paying attention to these extrinsic factors, however, will reduce government intervention and intrusion. See *id.* In other words, do it yourself or be told how to do it by the government.

⁵⁵ See *id.*

⁵⁶ See *id.* at 410, 412. As Millstein explains, "integration of extrinsics—the corporation's efforts to balance societal concerns of employees, customers, suppliers, and communities, without compromising shareholder wealth—[is] central to the perpetuation of the corporation and our system . . ." See *id.* at 410. Moreover, "[f]or the corporation to be allowed to continue to enjoy its place and privilege," it must integrate intrinsics. See *id.* at 412.

⁵⁷ To these scholars, it is far too difficult for management to balance the needs of both shareholders on the one hand and creditors, suppliers, and employees on the other. Too often, these constituents' goals will be inconsistent, making it impossible for the managers to know

have argued that shareholder constituency statutes are not enacted to protect the public but to help incumbent management avoid job displacement.⁵⁸ Scholars have further argued that these statutes, many of which are drafted as antitakeover statutes, improperly protect jobs and nonshareholder interests at the expense of shareholders.⁵⁹ Consideration of other interests, however, may create benefits in other parts of the economy.⁶⁰ In other words, these alleged losses ultimately may produce a desirable result, even for the same shareholders.⁶¹

what to do. *See* Butler, *supra* note 45, at 99; Davis, *supra* note 45, at 8. *But see* Thomas Lee Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. REV. 273, 283-84 (1991) (recognizing that even shareholders and managers often have divergent interests, and that this alone does not preclude managers from acting in shareholders' best interests).

⁵⁸ *See* Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 399 (1993).

⁵⁹ *See id.* It is not clear that these losses to shareholders have occurred, or that it would be improper if they had.

⁶⁰ *See* WILLIAM WOLMAN & ANNE COLAMOSCA, *THE JUDAS ECONOMY: THE TRIUMPH OF CAPITAL AND THE BETRAYAL OF WORK* 82-85, 111-12 (1997) (noting that consideration of the rights and status of workers would increase productivity).

⁶¹ *See id.* at 29 (discussing how the rush of American corporations to hire cheaper foreign labor has increased profits but reduced the standard of living of most Americans). Preventing some corporate profits in favor of other societal goals could be economically efficient. This is not to say that all scholars would recognize these results as efficient. What is efficient depends upon what is measured over what period of time and upon whether efficiency is measured in terms of global or more individual wealth maximization. Either way, the notion that corporations have fiduciary responsibilities appears to be alive and well. *See generally* Millstein, *supra* note 49, at 413-15 (arguing that, if corporate fiduciary responsibilities are not recognized, corporations may lose some of their current privileges). Opponents of these views have been no more successful in eradicating these ethical considerations from existing corporate law than they have been in eliminating Chapter 11.

"Contractarian" is the name sometimes given to the scholars who disagree with the idea that corporations have fiduciary responsibilities. *See* Hazen, *supra* note 57, at 285. Contractarians generally view the corporation as a nexus of contracts, leaving the various constituents of the corporation free to negotiate the terms of their own contract in order to protect their interests. *See id.* Contractarians believe the best way to achieve efficiency is to allow the parties to bargain unfettered by government imposition of restraints. *See id.* If restraints are imposed, so the theory goes, resources are unable to move into the hands of those most willing to pay for them, and efficiency breaks down as a result. *See id.*

In this vein, Contractarians view the managers of corporations as sellers of fiduciary protections and the corporate stockholders as the particular buyers of those protections. Contractarians believe each constituent of the corporation is free to bargain for the protection

Assuming that these corporate fiduciary responsibilities do exist, they do not disappear when a corporate bankruptcy is filed.⁶² Recognizing corporate fiduciary responsibilities is consistent with the Bankruptcy Code's rehabilitative policies, including the Code's goals of saving jobs and community resources.⁶³ In fact, Chapter 11 is based on the entity theory of the corporation,⁶⁴ further

they desire as long as there are no restraints imposed. *See id.* at 206; Rutherford B. Cambell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 565 (1996).

⁶² *See* Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467, 1467-68 (1988); *The Chapter 11 Players in Contemporary Bankruptcy Practice: Roles, Obligations, and Ethical Considerations of Debtors in Possession, Trustees, Examiners, and Committees*, 668 PLI/Comm 371, 380 (1993). In a typical corporate bankruptcy, the corporation's fiduciary obligations broaden to include not just shareholders and suppliers but also creditors. *See* Donovan S. Schuenke v. Sampsell, 226 F.2d 804, 812 (9th Cir. 1955); *Mediators, Inc. v. Manney Inc.*, 1996 WL 554576 (S.D.N.Y. Sept. 30, 1996); *see generally* Thomas G. Kelch, *The Phantom Fiduciary: The Debtor in Possession in Chapter 11*, 38 WAYNE L. REV. 1323 (1992) (discussing a Chapter 11 debtor's fiduciary responsibilities); John T. Roache, *The Fiduciary Obligations of a Debtor in Possession*, 1993 U. ILL. L. REV. 133 (discussing the debtor in possession's fiduciary obligations to creditors and shareholders). For a general discussion of a Chapter 11 bankruptcy debtor's fiduciary obligations, *see* C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 52-57, 59-60 (1997).

Nothing suggests that obligations to employees or to the community at large cease simply because a corporation becomes insolvent. A contrary conclusion can be inferred from the priority system found in 11 U.S.C. §§ 503 and 507, which places employee benefit plans in a priority position for the purpose of bankruptcy distribution. *See* 11 U.S.C. §§ 503, 507 (1994).

⁶³ The purpose of a reorganization proceeding is to keep the debtor in business. According to Congress, it is "better for a business to be rehabilitated than to be liquidated so that the suppliers of the debtor and its employees will not lose their sources of revenue . . . [T]he employees will retain their jobs and continue to be paid for services." *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Improvements in the Judicial Machinery of the Committee of the Judiciary on S. 2266 and H.R. 8200*, 95th Cong. 726 (1977) (statement of Sylvan M. Cohen, President of Pennsylvania Real Estate Investment Trust). In discussing the purpose of providing priority treatment for wages and benefits, Congress stated that the "purpose of this priority, as with the administrative expense priority, is in part to ensure that employees will not abandon a failing business for fear of not being paid. In that sense, it contributes to financial rehabilitation." H.R. REP. NO. 95-595, at 187 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-48.

⁶⁴ *See In re Hickory Mills Apartments of Columbus, Ltd.*, 133 B.R. 898, 901 (Bankr. S.D. Ohio 1991) (noting that the Bankruptcy Code has adopted the entity theory of the corporation).

establishing that corporations in Chapter 11 have fiduciary responsibilities to parties other than creditors and shareholders.⁶⁵ Because there is nothing in the Bankruptcy Code that eradicates a corporation's obligation to act in a manner consistent with general societal interests, and because the Bankruptcy Code itself imposes fiduciary responsibilities on corporate debtors,⁶⁶ a broader variety of interests should be considered by debtors when making pivotal issues in a Chapter 11 case. Most current case law regarding standing, however, fails

⁶⁵ See Rapoport, *supra* note 2, at 807–17. Professor Rapoport suggests that a debtor in possession may owe fiduciary responsibilities to persons who are neither creditors nor shareholders of the debtor. *See id.* She argues that the debtor's counsel is in a unique position to help the debtor discharge its obligations to such interests, by advising the debtor of these fiduciary obligations. *See id.* at 787–98. According to Rapoport, the debtor's counsel is “a counselor, obligated to explore and explain the ramifications of possible strategies to the client. Moreover, she has the duty to the legal system as an officer of the court that she cannot forget.” *Id.* at 789. Professor Rapoport also suggests that any attorney can stress psychological and moral considerations when counseling a debtor in possession, *see id.* at 821, suggesting at least the possibility that these factors could take precedence over profit maximization.

⁶⁶ Admittedly, these obligations are tempered by obligations to creditors first and shareholders second, but these obligations remain nonetheless. Section 1129(b)(2)(B)(ii) provides that equity holders, which are lower in priority than creditors, may not receive any money under a Chapter 11 plan unless creditors agree or are paid in full. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (1994). Even shareholders who will receive no distribution under the plan continue to have bankruptcy court standing, however, indicating that standing is not dependent upon receiving a distribution from the estate. *See* Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 303 (4th Cir. 1987); *see also* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 680–83 (1993) (noting that shareholders are parties in interest); Bowles & Rapoport, *supra* note 62, at 89–90 (noting that debtors may owe fiduciary duties to both creditors and shareholders even if the debtor is insolvent). As one author has noted, while it is true that the debtor in possession is required to maximize returns to creditors, this is not to be done at the expense of shareholders, whose rights are more junior to creditors. *See* Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganization: A Case for Modified Procedures*, 69 IND. L.J. 581, 588 n.47 (1994) (stating that the debtor in possession need not “select a mode of maximization that harms equity in order to satisfy creditors faster, when another alternative exists which serves creditors' as well as equity's interests”). Professors LoPucki and Whitford claim that debtors-in-possession continue to have fiduciary obligations to shareholders even after insolvency. *See* LoPucki & Whitford, *supra*, at 745–46. They also argue that the competing obligations to creditors and shareholders do not pose an intrinsic problem because managers of debtors in possession do not—as one would suspect—always align themselves with the interests of shareholders. *See id.* Similarly, whether nonpecuniary interests are to be compensated or not, they may be entitled to standing in a Chapter 11 case.

to recognize these responsibilities to noncreditor interests, and instead holds that bankruptcy courts standing is limited primarily to debtor and creditor interests.

C. Defining Bankruptcy Court Standing: The Judge's Role

Under most case law, one needs a present economic or "pecuniary" interest to assert in order to be heard in a bankruptcy proceeding. This rule precludes or limits participation in Chapter 11 cases by two groups of persons: (1) those who have a pecuniary interest to assert, but who also want to assert a nonpecuniary interest,⁶⁷ and (2) those who have no pecuniary interest to assert and are thus unable to participate in the proceeding at all.⁶⁸

Although the Bankruptcy Code has been interpreted to preclude nonpecuniary rights from being heard, nothing in the Bankruptcy Code requires this result.⁶⁹ In fact, the Bankruptcy Code's language permits a much broader interpretation of standing, thus permitting a variety of rights to be adjudicated by bankruptcy courts.⁷⁰

1. Limitations Based on Pecuniary Rights

Bankruptcy court is a primarily economic forum, primarily addressing issues surrounding the accumulation, repayment, and discharge of

⁶⁷ For an example of this type of interest, being asserted by an existing creditor, see *infra* notes 147-48 and 152-61 and accompanying text.

⁶⁸ For examples of these types of interests, see *infra* notes 149-50 and 162-82 and accompanying text.

⁶⁹ See 11 U.S.C. § 1109 (1994). Section 1109 does provide standing to all "parties-in-interest," but courts have defined this phrase to mean only parties with a current pecuniary interest in the debtor. See *In re Alpex Computer Corp.*, 71 F.3d 353, 356 (10th Cir. 1995); *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 756 (4th Cir. 1993) ("[P]arty in interest . . . is 'generally understood to include all persons whose pecuniary interests are directly affected by bankruptcy proceedings.'" (quoting *White County Bank v. Leavell (In re Leavell)*, 141 B.R. 393, 394 (Bankr. S.D. Ill. 1992))).

⁷⁰ See *supra* notes 92-98 and accompanying text. While one might question whether allowing these rights to be asserted in this context would actually be desirable, doing so may be necessary in order to ensure that the bankruptcy system, as it is applied to pivotal issues in large Chapter 11 cases, continues to serve society's greater needs. Huge Chapter 11 cases have an enormous impact on society as a whole, both in terms of results stemming from the case—such as job loss, payment of indebtedness, and so on—and legal and court-costs, some of which are paid by creditors and others of which are paid by taxpayers and even society as a whole. See GROSS, *supra* note 2, at 83-86; Warren, *supra* note 27, at 796.

indebtedness.⁷¹ I emphasize the word "primarily" because what occurs in bankruptcy cases, particularly in large Chapter 11 cases, is far more complex than in even the most sophisticated litigation in other fora. Because there is no complaint initiating a bankruptcy and, at least initially, no plaintiffs or defendants, one never knows what relief actually will be requested in a case.⁷² There are endless numbers of potential "parties in interest," all asserting different types of rights at different stages of the proceeding.⁷³ Given this complexity, the variety of litigated issues, and the primary reason for the trip to bankruptcy court in the first place,⁷⁴ most courts have found bankruptcy

⁷¹ As bankruptcy courts frequently state, "[o]nce the assets have been identified . . . it is the role of the bankruptcy court to determine . . . the distribution of those assets and the determination of the parties' rights to them in accordance with the priorities set out by the Bankruptcy Code." *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993); see also *In re Allied Computer Repair, Inc.*, 202 B.R. 877, 880-81 (Bankr. W.D. Ky. 1996) ("The Bankruptcy Court plays a significant role in protecting the assets of the bankruptcy estate in order that they be maximized for the benefit of the creditors thereof."); *In re Operation Open City, Inc.*, 170 B.R. 818, 824 (Bankr. S.D.N.Y. 1994) ("the central role of a bankruptcy court [is] distributing the assets of the bankruptcy estate").

⁷² The complaint initiating a civil lawsuit outside bankruptcy tells the parties to the case what the case is all about. See FED. R. CIV. P. 4(a). It notifies those parties what interests are at stake, what damages are being requested, and precisely whose interests are affected. See FED. R. CIV. P. 8. Bankruptcy cases are initiated by petition, see U.S.C. §§ 301-303 (1994), and what occurs from that point on varies greatly from case to case, even within the context of Chapter 11 alone. Moreover, unlike regular litigation in which essentially everyone affected is a plaintiff or defendant, in bankruptcy, many nonparties are affected. See Rapoport, *supra* note 2, at 787-89.

⁷³ See Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 U. CONN. L. REV. 913, 914-15 (1994) (noting the frequency with which parties change their allegiance and at times their position, in a typical Chapter 11 case). Many matters heard by a bankruptcy court are heard by motion. See FED. R. BANKR. P. 9013. Persons whose financial interests are affected are given notice of the motion and other persons may receive notice as well. See *id.* There are hundreds of different types of motions, and if any one is contested, it is considered a contested matter, as that phrase is defined in Rule 9014. See FED. R. BANKR. P. 9014. Some matters brought before a bankruptcy court must be initiated by complaint. See FED. R. BANKR. P. 7000-7087. These are called adversary proceedings and involve a litigation procedure very similar to that found in federal district court, with a greatly truncated timetable. See *id.* In addition, there are complex hearings to consider confirmation of a Chapter 11 plan, to approve asset sales, and to settle claims and litigation to which the debtor is a party. See *id.*

⁷⁴ It is assumed here, and is typically the case, that debtors typically file a Chapter 11 petition as a result of excessive indebtedness that they are unable to pay. This is not always the case. In *In re Texaco*, 84 B.R. 893 (Bankr. S.D.N.Y. 1993), Texaco filed a Chapter 11 petition in order to forestall payment of a judgment obtained against it by Pennzoil. See *id.* at

standing to be limited in two ways.⁷⁵ First, the vast majority of courts have held that one must have a pecuniary or economic stake in the proceeding in order to be heard.⁷⁶ Second, many courts have held that a party can have standing on one issue in a case but not another, depending on the nature of the rights asserted and the impact that a particular issue has on those rights.⁷⁷

894. There was no indication that Texaco could not pay the judgment or that its financial condition was not otherwise perfectly healthy. *See id.*; *see also* KEVIN J. DELANEY, STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE 126-59 (1992) (describing his perceived abuse in Texaco's use of the bankruptcy system to avoid Pennzoil's judgement).

⁷⁵ There are many variations of these two themes, but for the most part, courts adjudicating standing issues base their reasoning on one or both of these reasons.

⁷⁶ *See In re Alpex Computer Corp.*, 71 F.3d 353, 356 (10th Cir. 1995). Although 11 U.S.C. § 1109(b) broadly defines a "party in interest," the phrase "is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings." *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 756 (4th Cir. 1993) (quoting *White County Bank v. Leavell (In re Leavell)*, 141 B.R. 393, 394 (Bankr. S.D. Ill. 1992)).

In determining whether a party has standing to be heard, some courts have held that party-in-interest standing may depend upon whether there is an interest in the distribution from the estate. *See In re North American Oil & Gas, Inc.*, 130 B.R. 473, 479 (Bankr. W.D. Tex. 1990) (party in interest "has been held to refer to anyone who has practical stake in the outcome of the case"); *see also In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987) (former trustee had no standing to object to court allowing government to prosecute suit against him on behalf of the estate); *In re Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983) (wife of debtor had no standing to object to appointment of trustee's special counsel in fraudulent conveyance action against her); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 707 (8th Cir. 1979) ("since the bankrupt is normally insolvent [and thus] considered to have no [pecuniary] interest," he lacks standing to appeal from an order of the bankruptcy court); *In re Karpe*, 84 B.R. 926 (Bankr. M.D. Pa. 1988) (party-in-interest status denied to bidder for estate property who had no interest in the *res* that would be created); *In re Malone Properties, No. 8607364 SGR* (Bankr. S.D. Miss. June 17, 1992), *aff'd*, No. S9-0375(R) (S.D. Miss. Nov. 4, 1992) (insurance carrier had no standing to appear before bankruptcy court on hearing termination of automatic stay).

⁷⁷ *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641-43 (2d Cir. 1988) (holding that party must have a pecuniary interest in the order that is being appealed in order to have right to appeal the order; thus creditor who did not possess an asbestos-related personal injury claim could not appeal plan confirmation order based on treatment of that class of claims under plan); *Official Unsecured Creditors Comm. v. Michaels (In re Marin Motor Oil)*, 689 F.2d 445, 453 (3d Cir. 1982) (stating "that the exact contours of the general phrase 'party in interest' will be clarified by rules [of bankruptcy procedure] and court decisions," and that courts have the discretion to deny party-in-interest status in a particular instance); *EFL, Ltd. v. Miramar Resources, Inc. (In re Tascosa Petroleum Corp.)*, 196 B.R. 856, 863 (D. Kan. 1996) (holding that prudential concerns with respect to standing preclude a creditor from

Why have so many bankruptcy judges taken a narrow view with respect to standing? There are several possible explanations. First, as previously stated, bankruptcy is primarily an economic forum,⁷⁸ and most bankruptcy judges are trained to recognize and address economic rather than noneconomic issues.

Second, most judges in all fora operate under a world view that most easily recognizes economic interests over other interests.⁷⁹ As Professor Denis Brion notes in *Rhetoric and the Law of Enterprise*,⁸⁰ the capitalist ethic⁸¹ world view has historically favored entrepreneurial forces over passive interests in land and other interests.⁸² Using the exploitation of Appalachian resources as one example,⁸³ Brion theorizes that this tendency to favor entrepreneurialism favors the most intensive use for each asset, regardless of the consequences for individual members of society.⁸⁴ This approach also favors the elite, who by necessity share a social class with judges themselves.⁸⁵ Brion claims that this tendency explains how the law in this country, which nominally favors individual rights and humanitarian goals,⁸⁶ can pay such minimal attention to

challenging portions of a plan that do not affect its direct interest); *In re Westwood Plaza Apartments*, 147 B.R. 692, 698 (Bankr. E.D. Tex. 1992) (“[C]reditors lack standing to challenge provisions of a plan that do not affect them.”); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 721 (Bankr. S.D.N.Y. 1992) (“[A] party who is not directly ‘aggrieved’ by the construction of a provision of the Plan would lack requisite standing.”) (quoting *In re Johns-Manville Corp.*, 68 B.R. 618, 623–24 (Bankr. S.D.N.Y. 1986)); *In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 647 (E.D. Pa. 1991) (“[C]reditors lack standing to challenge those portions of a reorganization plan that do not affect their direct interest.”); *In re Orlando Investors, L.P.*, 103 B.R. 593, 597 (Bankr. E.D. Pa. 1989) (declaring that a “statutory right to be heard on an issue” does not include “the right to assert interests possessed solely by others”).

⁷⁸ See *supra* note 71 and accompanying text.

⁷⁹ By “economic” I mean the interests of production and product, as compared to land rights or other more passive forms of property.

⁸⁰ 42 SYRACUSE L. REV. 117 (1991).

⁸¹ Brion defines this phrase as the American culture world view that finds no inconsistency or difficulty in favoring enterprise and its products over land entitlement. Brion claims that this world view is ubiquitous, permeating not only legal discourse, but all other loci of public discourse as well. Brion claims that this world view is so incredibly strong that it prevails despite the fact that it is strongly at odds with deep political views that such favoritism should not exist. See *id.* at 118.

⁸² See *id.*

⁸³ See *id.* at 119–25.

⁸⁴ See *id.* at 126–32, 138–42.

⁸⁵ See *id.* at 150.

⁸⁶ See *id.* at 148–49.

these issues.⁸⁷ Finally, Brion alludes that those who litigate most are most favored in the process through a combination of these factors and a familiarity with the system.⁸⁸ Although Brion did not apply his theories to bankruptcy courts, they may be equally useful in explaining how bankruptcy courts make decisions. Bankruptcy judges are more likely to recognize familiar commonly-litigated, economic interests, rather than the more unusual and less tangible noneconomic ones.

Finally, recognizing a narrow range of issues may simply make life easier for the judiciary. Courts can think and speak in the most common language of the forum: that of money, the *raison d'être* of each Chapter 11 debtor's trip to court. This is not the sole reason other parties appear in that forum, however, and their nonpecuniary interests should not be ignored by the judiciary, which has full authority to consider these interests.⁸⁹

Although courts have held that one must have a current economic right to be heard and that whether one has standing can vary from issue to issue, these holdings are not the product of careful statutory interpretation. The idea that standing varies from situation to situation seems to make a great deal of sense, but is at odds with the language of the standing statute.⁹⁰ The other common notion, that standing is limited to persons with pecuniary rights, is entirely inconsistent with existing statutory law.⁹¹

⁸⁷ See *id.*

⁸⁸ See *id.* at 152 (arguing that those with power tend to "dominate discourse").

⁸⁹ Many judges already take these kinds of interests into account when they make decisions. See, e.g., *In re Financial News Network, Inc.*, 980 F.2d 165, 169-70 (2d Cir. 1992) (stating that bankruptcy courts have broad flexibility in determining which bidder is the successful one in a § 363(b) sale); *In re After Six, Inc.*, 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993) (declaring that "[t]he Bankruptcy Code, like any law, must be read in its content as a tool of mankind, not a body of edicts to which mankind is a slave"). My own experience in practice, however, as well as my discussions with others, lead me to believe that judges would rather consider these interests without doing so explicitly in reported decisions. Part of the purpose of this Article is to make explicit what is currently occurring implicitly.

⁹⁰ See *In re Tascosa Petroleum Corp.*, 196 B.R. 856, 862-63 (D. Kan. 1996) (discussing whether Article III prudential concerns apply in bankruptcy or in fact, whether that standard for bankruptcy standing is more lenient than the Article III requirements).

⁹¹ See 11 U.S.C. § 1109 (1994). Often the requirement that a party possess a pecuniary interest in or against the debtor is implicit in court discussions regarding standing. For example, in *In re Zaleha*, 162 B.R. 309 (Bankr. D. Idaho 1993), the court noted a tendency of courts to disallow standing to creditors who purchased claims, but failed to comply strictly with the transfer requirements of Bankruptcy Rule 3001, implying that one must be a creditor to have standing. See *id.* at 313 (citing FED. R. BANKR. P. 3001). Other courts have stated point blank that without creditor status, a party lacks standing to object to a sale or settlement

Standing in Chapter 11 cases is conferred by section 1109(b)⁹² of the Bankruptcy Code, which provides that

(b) A party in interest, *including* the debtor, the trustee, a creditor's committee, an equity security holder's committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a case under [Chapter 11].⁹³

The statute purports to identify both who may be heard and the issues on which they may be heard.⁹⁴ The statute permits anyone who is a "party in interest" to be heard on *any* issue in a case,⁹⁵ but does not define "party in interest."⁹⁶

agreement. *See In re Bicoastal Corp.*, 164 B.R. 1009, 1015 (Bankr. M.D. Fla. 1993) (noting that any beneficiary of a plan, no matter how remote such beneficiary status is, has a right to object and be heard on confirmation of a debtor's plan and that those who are not beneficiaries lack this status). This court also concluded, consistent with this approach, that a creditor whose claim is eliminated through setoff of a claim by the debtor back against it can be ignored and denied the right to be heard on any issue in a case. *See id.*

Other courts have articulated the same idea in a variety of ways. For example, under some analyses, claimants must file proof of claims (and thus hold claims) in order to "participate in a reorganization." *In re B. Cohen & Sons v. Caterers, Inc.*, 124 B.R. 642, 644 n.1 (E.D. Pa. 1991) (citing *In re Charter Co.*, 876 F.2d 861, 863 (11th Cir. 1989)).

Other courts side-step the issue, declaring that only parties in interest may object to a plan under § 1128 of the Bankruptcy Code, and that a creditor is a party in interest. *See In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1551 n.5 (11th Cir. 1990) (citing 8 COLLIER ON BANKR. ¶ 3020.04 (15th ed. 1989)). This approach defies deductive logic. Even assuming that all fire trucks were red, it would not follow that these are the only red things. While it is true that creditors are parties in interest, the term is by no means limited to creditors. *See In re UNR Indus. Inc.*, 71 B.R. 467, 471 (Bankr. N.D. Ill. 1987) (finding that the word "including" contained in § 1109 indicates that the list of parties in the statute is not exclusive).

⁹² 11 U.S.C. § 1109(b) (1994).

⁹³ *Id.* (emphasis added).

⁹⁴ *See id.*

⁹⁵ *See id.* Obviously, the statute does not mean any issue at all; the issue must be related to the case.

⁹⁶ *See In re River Bend-Oxford Assoc.*, 114 B.R. 111 (Bankr. D. Md. 1990). As the court explained:

The phrase "party in interest" can be found in 46 separate sections of the Bankruptcy Code, [yet is undefined in Section 101]. Th[e] lack of . . . definition was intentional. Congress[s] failure to define party in interest specifically was discussed by both Senator DeConcini and Representative Edwards during the proceedings preceding the enactment of the Bankruptcy Code . . . Senator

Section 1109 provides a list of parties who qualify as parties in interest, but the list does not purport to be exclusive. In other words, the concept of "party in interest" is defined by example. If one *needed* to be a creditor (or an equity holder) to have standing, the word "including" would be superfluous in the statute, which would violate a primary canon of statutory interpretation.⁹⁷ Thus, on its face, section 1109 permits parties other than debtors, creditors, and equity holders to assert rights in a bankruptcy case.⁹⁸

2. Contextual Applications of Section 1109

Consistent with this reading of the statute, a few bankruptcy courts have concluded that there is no requirement that the asserted right be pecuniary in order to be heard. Rather, one must have a "sufficient stake" in the proceeding,⁹⁹ a "vital interest at stake,"¹⁰⁰ an "interest in" the case,¹⁰¹ or

DeConcini stated: "Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question."

Id. at 113 (quoting 124 CONG. REC. S17,407 (daily ed. Oct. 6, 1978)). "Party in interest" is an expandable concept, depending upon the particular factual context in which it is applied. *See id.*

⁹⁷ "It is a canon of statutory interpretation not to treat any words as superfluous but to give all the language some meaning . . ." *Fluet v. McCabe*, 12 N.E.2d 89, 92 (Mass. 1938); *see also In re UNR Indus., Inc.*, 71 B.R. 467, 471 (Bankr. N.D. Ill. 1987) (concluding that the word "including" in § 1109 is expansive, not limiting).

⁹⁸ Arguably, the word "including" does not mean this at all, but merely means that the concept of a party in interest includes the following parties and no one else. This is not the interpretation given by most courts that have analyzed the meaning of this statute, however. *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985); *In re UNR Indus., Inc.*, 71 B.R. at 471 n.9. Moreover, if the statute was designed to be exclusive, it should say so explicitly.

⁹⁹ *See In re UNR Indus., Inc.*, 71 B.R. at 471.

¹⁰⁰ *See In re Wolf Creek Valley Metropolitan Dist. No. IV*, 138 B.R. 610, 615 (D. Colo. 1992) (holding that the critical test regarding bankruptcy court standing is whether the prospective party has a sufficient stake in the proceeding to require representation).

¹⁰¹ *See In re James Wilson Assoc.*, 965 F.2d 160, 169 (7th Cir. 1992). As the court explained:

We think all the section means is that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.

simply a right to "fair representation" in the Chapter 11 case before asserting nonpecuniary rights.¹⁰²

a. *The Asbestos Cases*

Some economic rights arise in the future, and consequently do not qualify as pecuniary rights. An example is future asbestos claimants—people who have been exposed to asbestos, who may contract asbestosis, cancer, or another serious injury as a result of such exposure, but who have no current symptoms, and no cause of action against the asbestos manufacturer. Many of these people are not even identifiable at the time the debtor is reorganizing.¹⁰³

Without some linguistic jostling, these persons do not possess a current economic right that can be asserted in an asbestos manufacturer's bankruptcy case; this is true because a claim for asbestosis generally does not arise until the injury becomes manifest.¹⁰⁴ Section 101(10) of the Bankruptcy Code defines a creditor as an entity with a "claim" that arose at or before the order for bankruptcy relief was entered.¹⁰⁵ Section 101(5) of the Bankruptcy Code, which defines a claim, requires that the holder of a claim possess a right to

Id. at 169; *see also In re Hathaway Ranch Partnership*, 116 B.R. 208, 213 (Bankr. C.D. Cal. 1990); *see also* 5 COLLIER ON BANKRUPTCY ¶ 1009.02, at 1109–27 (15th ed. 1996) (stating that "party in interest" is to be interpreted broadly to allow those parties affected by the Chapter 11 case to be heard).

¹⁰² *See In re Public Service Co. of New Hampshire*, 88 B.R. 546, 550 (Bankr. D.N.H. 1988); *In re Johns-Manville, Corp.*, 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984).

¹⁰³ *See In re Amatex Corp.*, 755 F.2d at 1041; *In re Waterman S.S. Corp.*, 141 B.R. 552, 558 (S.D.N.Y. 1992); *In re UNR Indus., Inc.*, 71 B.R. at 471; *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 477 (Bankr. N.D. Ill. 1986); *In re Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986).

¹⁰⁴ *See In re Amatex Corp.*, 755 F.2d at 1035; *In re Johns-Manville*, 68 B.R. at 628; *see also* Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 AM. BANKR. L.J. 515, 515 (1995) (stating that the Code must be amended to provide that future asbestos claims qualify as "'claims' that 'arise' at the time that the debtor commits the act on which liability is based"); Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L.J. 69, 75–76 (1986).

¹⁰⁵ *See* 11 U.S.C. § 101(10) (1994); *see also In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 645 (Bankr. E.D. Pa. 1991) (defining creditor as an entity with a claim that arose at or before the order for relief was entered).

payment or a present right to an equitable remedy from the debtor.¹⁰⁶ No such current right exists in persons who have not yet manifested any illness.

This situation has posed a dilemma for courts and debtors.¹⁰⁷ Under the Chapter 11 scheme in place when these cases were decided,¹⁰⁸ only "claims" could be handled in a Chapter 11 plan¹⁰⁹ and only "claims" could be discharged.¹¹⁰ Moreover, only "parties in interest" could participate in these cases at all.¹¹¹ Although courts sought to be fair to these persons,¹¹² who would

¹⁰⁶ See 11 U.S.C. § 101(5) (1994); see also *In re Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla. 1994), *aff'd*, 168 B.R. 134 (S.D. Fla. 1994) (holding that a class of future claimants did not hold "claims" against the debtor when there was no discernable connection between the debtor and the alleged class of claimants).

¹⁰⁷ See *In re Amatex Corp.*, 755 F.2d at 1035; *In re Waterman S.S. Corp.*, 141 B.R. at 554; *In re UNR Indus., Inc.*, 71 B.R. at 470; *In re Johns-Manville*, 68 B.R. at 624.

¹⁰⁸ See 11 U.S.C. § 524 (1994). In 1994, the so-called Manville Amendments were added to the Code. These amendments specifically provide party-in-interest status to asbestos claimants and otherwise address the treatment of asbestos claims in Chapter 11 plans. See *id.*

¹⁰⁹ The National Bankruptcy Review Commission (NBRC) appointed to consider new amendments to the Bankruptcy Code, has proposed additional legislation addressing mass tort cases, such as asbestos cases. Because the 1994 Manville Amendments did not apply to or address other types of mass tort cases, the NBRC has proposed various amendments to broaden the original amendments. Among the proposed amendments is an amendment to the definition of the "claim" in 11 U.S.C. § 101(5). See NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 9 (Oct. 20, 1997) [hereinafter NBRC Report].

¹¹⁰ 11 U.S.C. § 1141(d)(1) (1994). Discharge, which relieves the reorganized corporate debtor from having to pay the obligation, outside the plan obligations, is the debtor's primary benefit to confirming a plan. See generally 11 U.S.C. § 1146 (1994) (discussing the special tax rules applicable to the discharge of indebtedness in Chapter 11 reorganizations). If that part of a claim that is unpaid is not discharged, then this very important bankruptcy feature is lost, and the case itself has lost much of its benefit for the debtor. See *In re Johns-Manville, Corp.*, 36 B.R. at 749.

¹¹¹ See 11 U.S.C. § 1109(b) (1994).

¹¹² For example, the *Manville* court noted:

Any plan not dealing with [the interests of potential asbestos claimants] precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization If they are denied standing as parties in interest, they will be denied all opportunity either to help design the ship that sails away from these reorganization proceedings with their cargo on board or to assert their interests during a pre-launching distribution.

certainly be affected if the debtor ceased to exist and thus became judgment-proof before future claims could be paid, debtors had other motives for recognizing future claims. Unless these future claims could be addressed in a Chapter 11 plan and ultimately discharged to the extent not paid, the company would continue to be laden with future asbestos suits and could never emerge free of this debt.¹¹³

Recognizing that these parties had no "claims" and apparently reading section 1109¹¹⁴ rather narrowly, some courts have relied on the broad equitable powers of section 105(a) of the Bankruptcy Code¹¹⁵ to grant party-in-interest status to these claimants, to provide representation to them in cases through a legal representative, and ultimately to permit the treatment of these future claims in plans of reorganization.¹¹⁶ Other courts held that section 1109 alone was already broad enough to grant party-in-interest status to future tort claimants.¹¹⁷ As the court stated in *In re UNR Indus., Inc.*:

The gist of section 1109 is clear. The right to participate in Chapter 11 cases is not limited to creditors and owners. Persons who are not creditors but

In re Johns-Manville, 36 B.R. at 749; see also *In re Amatex Corp.*, 755 F.2d at 1041 (stating that it is in the interest of future tort victims to recover from the plan, as there may be no other source of recovery).

¹¹³ As the Court in *In re Amatex Corp.* stated:

Amatex, the debtor, filed the petition to appoint a guardian ad litem. Its major concern is to receive a discharge in the reorganization proceeding from all possible claims—including those of future asbestos victims. . . . It is in the interest of Amatex that future claimants be deemed creditors in order that their claims might be discharged by the plan.

In re Amatex Corp., 755 F.2d at 1043. The debtor in *In re UNR Industries* had a similar motive. See *In re UNR Indus., Inc.*, 71 B.R. at 470 ("The debtor wants to resolve the question of whether the putative claimants and/or future claimants are in fact 'creditors' It would prefer that both groups be determined to be 'creditors' so that they can . . . have these potential claims discharged by its plan.").

¹¹⁴ See 11 U.S.C. § 1109 (1994).

¹¹⁵ See 11 U.S.C. § 105(a) (1994).

¹¹⁶ See *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 477 (Bankr. N.D. Ill. 1986).

¹¹⁷ See *In re Amatex Corp.*, 755 F.2d at 1042; *In re UNR Indus., Inc.*, 71 B.R. at 471; *In re Johns-Manville*, 68 B.R. at 623.

nevertheless have demonstrated a sufficient stake in the outcome of the case may be deemed to be parties in interest and be entitled to be heard¹¹⁸

In *In re Amatex Corp.*, the court similarly held that individuals who were exposed to asbestos but did not manifest any symptoms had a practical stake in the reorganization, entitling them to party-in-interest standing and a voice in the reorganization proceeding.¹¹⁹ Thus, some courts have granted bankruptcy court standing to persons who did not hold traditional bankruptcy court claims.

b. *Conferring Standing on Groups Representing the Public Interest*

Although courts have been consistent in conferring bankruptcy court standing on future asbestos claimants, there has been less consistency in allowing states and consumer groups to assert rights in bankruptcy cases on behalf of the public. The voices of these groups have been heard by some courts and silenced by others.

As for the rights of states and municipalities, the State of Iowa was recognized as a party in interest that could be heard on any issue in a Chapter 11 bankruptcy case.¹²⁰ The court relied on the official comment to section 1109, which stated that this section "continues the broad concept of the absolute right to be heard in order to ensure fair representation in the case."¹²¹ The State

¹¹⁸ See *In re UNR Indus., Inc.*, 71 B.R. at 471 (quoting *In re Amatex Corp.*, 755 F.2d at 1042).

¹¹⁹ See *In re Amatex Corp.*, 755 F.2d at 1042.

¹²⁰ See *In re Citizens Loan & Thrift Co.*, 7 B.R. 88, 90 (Bankr. N.D. Iowa 1980).

¹²¹ See *id.* Several courts have held that states, governmental entities, and municipalities are entitled to standing under 11 U.S.C. § 1109(b). See *id.*; *In re Public Service Co. of New Hampshire*, 88 B.R. 546, 555 (Bankr. D.N.H. 1988); see also *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940) (finding that the Securities and Exchange Commission had standing under the Bankruptcy Act). In holding that the state auditor was allowed to intervene as a party in interest in the debtor's bankruptcy, the Bankruptcy Court of Iowa stated that, "[a]s the entity charged with the duty of supervision of industrial loan companies by Chapter 536A of the Iowa Code, the State Auditor is a 'party affected' by the proceedings." *In re Citizens Loan & Thrift Co.*, 7 B.R. at 90. Likewise, the State of New Hampshire was allowed to intervene in a debtor's bankruptcy because it had a statutory basis for being involved, namely ensuring the regulatory compliance of the debtor in reorganization. See *In re Public Service Co. of New Hampshire*, 88 B.R. at 555. The SEC was also allowed to intervene in a Chapter 11 case because "[t]he Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it." *SEC v. United States Realty & Improvement Co.*, 310 U.S. at 460; *In re Co Petro Marketing Group, Inc.*, 680 F.2d 566,

of New Hampshire similarly was recognized as a party in interest in the largest public utility bankruptcy in the country, in which the debtor provided electricity to most of the state.¹²² Despite the fact that these official bodies did not have creditor status, they were allowed to be heard in these cases on issues affecting the general public.¹²³

Nongovernmental public interest groups have not fared as well. In *In re Public Service & Improvement Co. of New Hampshire*, a consumer advocate and industry association requested full party-in-interest status from the court.¹²⁴ Such status was denied to both entities, in part because the State already was representing the interests of the public.¹²⁵

In *In re Ionosphere Clubs, Inc.*, the first Eastern Airlines reorganization proceeding, a consumer group that, among other things, published *Consumer Reports*, sought to force the airline to honor a prepetition agreement regarding the exchange of airline tickets.¹²⁶ In order to accomplish this, the consumer group, Consumers Union, needed standing, which the court refused to grant.¹²⁷ The court conceded that section 1109's language was broad, but concluded nevertheless that one must be a creditor, or have a right to equitable relief, in order to have standing.¹²⁸ Because the group itself had no such rights, and had not identified a particular group whose rights it had permission to assert, the court refused to grant Consumers Union standing.¹²⁹

573 (9th Cir. 1982). The Bankruptcy Court was not required to give these entities standing, and under the Supremacy Clause of the Constitution, arguably could have ignored their interests altogether. These bankruptcy courts' willingness to grant standing in these instances demonstrates a willingness to factor noneconomic interests into the bankruptcy system.

¹²² See *In re Public Service Co. of New Hampshire*, 88 B.R. at 550-57.

¹²³ See *id.*; *In re Citizens Loan & Thrift Co.*, 7 B.R. at 90.

¹²⁴ See *In re Public Service Co. of New Hampshire*, 88 B.R. at 549-57.

¹²⁵ See *id.* at 555.

¹²⁶ See *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 847 (Bankr. S.D.N.Y. 1989). Eastern, in its reorganization plan, sought to exchange prepetition airline tickets for postpetition travel. Consumers Union (CU) argued that this inadequately compensated customers, and advocated for a complete refund of the prepetition ticket prices. See *id.*

¹²⁷ See *id.* at 848-51.

¹²⁸ See *id.* at 849.

¹²⁹ See *id.* at 848. In fact, CU did obtain powers of attorney from eight individuals who gave CU the right to represent their interests in the case. The court opinion states that CU had not become involved until after a law firm contacted it and offered to represent its consumer constituents in this case, completely free of charge. See *id.* CU then solicited powers of attorney from 40,000 people, ultimately obtaining only eight, one of which was from a CU employee. See *id.*

Neither of these consumer advocate cases preclude the possibility of recognizing standing for such groups in the future. In the *Public Service Co. of New Hampshire* case, the additional representation of the consumer group was seen as redundant and thus unnecessary. The Eastern Airlines case also presented unique circumstances. If Consumers Union had been hired by a legitimate group of consumers, the group may well have been permitted participation. In situations in which a substantial interest is unrecognized and unrepresented in a case, granting standing to a consumer group could be extremely important.

3. Additional Support for a Broader Standing Standard

There are several reasons to take a broader approach to standing. First, as discussed above, the statute clearly permits courts to grant standing more freely and may even require it.¹³⁰ Second, other federal courts do not limit standing to those with pecuniary interest.¹³¹ To have standing in other courts, one must have only a direct and substantial interest;¹³² the injury need not be financial or the resulting obligation immediately due and payable. Nothing in the Bankruptcy Code itself modifies this standard. Although discussing a slightly

¹³⁰ See *supra* notes 91-98 and accompanying text.

¹³¹ Although bankruptcy courts are not Article III courts, they enforce constitutional limitations on standing. See *EFL Ltd. v. Miramar Resources, Inc. (In re Tascosa Petroleum Corp.)*, 196 B.R. 856, 863 (Bankr. D. Kan. 1996). Article I in no way limits standing to persons with pecuniary rights and in fact provides standing to anyone with a "substantial" stake in the proceeding or an "injury in fact." *Id.* These persons are defined as "persons aggrieved." *Id.*

¹³² See *id.* It is possible that this standard is actually more stringent than that imposed in bankruptcy court. As the court in *Miramar Resources* stated:

11 U.S.C. § 1109(b) expands the right to be heard in a Chapter 11 proceeding to a wider class than those who qualify under the "person aggrieved" standard. The "person aggrieved" standard applies to those wanting to *appeal* a bankruptcy order, and is more exacting than the constitutional "injury in fact" requirement of standing. *In re Alpex Computer Corp.*, 71 F.3d 353, 357 n.6 (10th Cir. 1995). It is unclear to this court what injury requirement for standing the Circuit intended for bankruptcy proceedings. However, this case is decided on the general prudential principal that one does not have standing to assert another's rights, regardless of the severity of injury required. See *Kane*, 843 F.2d at 642 (standing involves two-step inquiry; first, whether litigant has been sufficiently injured, and second, whether litigant is proper proponent of the rights he seeks to assert).

Id. at 863 n.6.

different issue, Professor Karen Gross recently proposed that the right to participate in a bankruptcy proceeding should be granted to anyone with a "nexus with the debtor for whom there is substantial injury caused by the bankruptcy filing and . . . an injury redressable through the reorganization process."¹³³ Regardless of the precise standard adopted, standing in bankruptcy need not rest on the existence of a financial interest.

These ideas are far from radical. The Bankruptcy Code scheme already recognizes numerous noneconomic interests. The Bankruptcy Code priority system and many other Code provisions demonstrate that dollars are not the sole issue in a Chapter 11 case. For example, the debtor must take the highest and "best" offer for its assets in a sale under section 363,¹³⁴ not merely the highest dollar value for such assets.¹³⁵ The debtor must propose a plan that is in the creditors' "best interest," not their best *economic* interest.¹³⁶ The debtor

¹³³ GROSS, *supra* note 2, at 228–29. This quoted material is Professor Gross's definition of a community. There are several distinctions between Professor Gross's proposal regarding bankruptcy participation and my own, although I believe they are primarily linguistic. In her thought-provoking book, Professor Gross discusses the need to consider community interests in bankruptcy. She defines a "community" as an interest that is substantial and is redressable through the reorganization case. *See id.* Standing itself is not discussed at any length, although for certain people—namely those who fit within the definition of a "community"—the result is the same: many persons who previously lacked standing would have it. The only two real differences I see between Professor Gross's approach and my own are: (1) I do not limit my proposal to "community" or "public" interests, but include expanded standing for private "nonpecuniary" interests as well; and (2) Gross's proposal requires courts to consider community interests, whereas my own proposal requires only that courts listen to the substantial interests that appear and request representation in the case. Aside from these differences, the approaches are very similar. She also proposes a variety of statutory amendments. Although I argue here that amendment is not necessary due to the broad language contained in Section 1109, I am beginning to change my view. If nothing else, amendment would surely clarify things for the judiciary and make explicit what many courts already do.

¹³⁴ *See* 11 U.S.C. § 363 (1994).

¹³⁵ *See id.*; *In re Financial News Network*, 126 B.R. 152, 157 (S.D.N.Y. 1991) (remanding to the bankruptcy court for a determination of whether the available bids were the highest and best offer for the debtor's estate). Similarly, in *In re After Six, Inc.*, 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993), the court stated that a bankruptcy court may accept a lower bid for a debtor's estate when that lower bidder had other factors such as societal needs in its favor. *See id.* The court went on to say that "[t]he Bankruptcy Code, like any law, must be read in its context as a tool of mankind, not a body of edicts to which mankind is a slave irrespective of its interests to the contrary." *Id.*

¹³⁶ *See* 11 U.S.C. § 1129 (1994) (emphasis added) (describing the standards in the Historical Notes to § 1129). Additionally, the broad automatic stay imposed by § 362 does not

may not reject a collective bargaining agreement simply because the contract is not economically efficient.¹³⁷

The priority system also recognizes that not every dollar loss is experienced equally by creditors. The priority system is designed to pay a higher rate to certain creditors because the loss will hurt them more.¹³⁸ It pays others at a higher rate based on fairness¹³⁹ or because certain values are considered higher in priority, on a societal level, than others.¹⁴⁰ All of these priority rules violate the general rule of equality of treatment¹⁴¹ and demonstrate sensitivity to noneconomic issues.¹⁴² The bankruptcy system in place right now is designed to achieve multiple goals, some economic and some noneconomic.¹⁴³ The

apply to government agencies pursuing actions to preserve the public's health and welfare. See 11 U.S.C. § 362(b)(4) (1994).

¹³⁷ See 11 U.S.C. § 1113 (1994). In fact, the debtor must negotiate carefully with the union to produce a new contract. If this is not successful, in some jurisdictions the debtor cannot reject the contract unless the contract will make the whole company liquidate. See *id.*; see also 11 U.S.C. § 1114 (1994) (providing that a reorganized debtor must continue to provide all employee benefits following confirmation of a plan).

¹³⁸ Examples of claims that are favored because the claimant would otherwise be disproportionately harmed include priority for certain wage claims and priority for employee benefits. See 11 U.S.C. § 507(a)(3) and (4) (1994).

¹³⁹ Examples of priorities that are favored out of fairness include priorities for administrative claims for people who transact business with the debtor postpetition, see 11 U.S.C. § 507(a)(1) (1994), priority for providing deposits on goods, see 11 U.S.C. § 507(a)(6) (1994), and priority for taxes, which would otherwise be paid by other taxpayers. See 11 U.S.C. § 507(a)(8) (1994).

¹⁴⁰ Examples of priorities based on societal values include those due for alimony, maintenance or support, or for child support. See 11 U.S.C. § 507(a)(7) (1994).

¹⁴¹ See *Morgan Guar. Trust Co. of N.Y. v. American Sav. & Loan Ass'n*, 804 F.2d 1487, 1496 (9th Cir. 1986) (stating that one of the primary goals of the bankruptcy laws is to provide for equality of treatment among creditors). The legislative history of the 1978 Bankruptcy Reform Act states that bankruptcy policy strongly favors equality of treatment of all creditors. See S. REP. NO. 95-989, at 112 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5898. The House debate on the Bankruptcy Reform Act also states, in the context of a student loan exemption, that the fundamental premises of the bankruptcy law are a fresh start for the debtor and equality of treatment for all debts and creditors. See 124 CONG. REC. 1792-93 (1978) (remarks of Rep. Dodd).

¹⁴² For example, Congress's decision to prioritize payments due to a spouse or child for support, alimony, or maintenance, even above those payments due to a governmental entity for taxes or penalties, demonstrates a sensitivity for the well-being of single parents and their children. See 11 U.S.C. § 507(a)(7) (1994).

¹⁴³ See Rapoport, *supra* note 2, at 837 (arguing that when social policies and bankruptcy policies clash, the debtor's counsel must ensure that the rights of unrepresented interests are considered by the court); Warren, *supra* note 27, at 787-88 (noting that persons without

system also contains considerable flexibility. Thus, recognizing bankruptcy standing as a broad concept is consistent with the existing bankruptcy system.

If further justification is needed to adopt a broad approach to standing, consider the alternative. A strictly pecuniary approach is certainly tidy, black and white, and easy to apply. Like many rules with these attributes, however, it is arbitrary and incoherent. It grants the right to be heard to those with claims, regardless of size,¹⁴⁴ and leaves those without that type of right with no voice at all. Attesting to its incoherence, one can simply go out and “buy” standing by buying someone else’s claim.¹⁴⁵ Needless to say, one should not have to purchase access to the court system.

III. CHAPTER 11: A MULTI-PARTY PARADIGM

In any Chapter 11 case, there are many potential parties in interest. As the prior section suggests, however, the traditional parties to the case are debtors and creditors. Adding even more parties will obviously create added costs. If costs are relevant to bankruptcy cases—and I believe they are—the question becomes whether these added costs are worth it. This question can be answered only if we can identify interests that currently are unheard and determine that they deserve to be heard.¹⁴⁶ If so, we must identify a purpose for hearing these

claims can be protected to some extent in a bankruptcy proceeding). Professor Warren does acknowledge, however, that the Code’s current provisions provide only one method of considering noncreditors’ interests, namely, keeping the debtor alive. See Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 355–56 (1993). The proposals in this Article consider additional ways in which to consider these noneconomic interests.

¹⁴⁴ Although it is certainly true that holders of smaller claims may have less to say about certain issues than holders of larger claims, as long as standing is based on pecuniary interests, those who have them can speak and those who do not have them cannot.

¹⁴⁵ In fact, buying and trading bankruptcy claims has become a cottage industry. See Chain J. Fortgang & Thomas Moers Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1, 2 (1990). Although some courts tend to look down on persons who attempt to gain control of a Chapter 11 debtor by buying a controlling share of claims in a particular class, see *id.* at 38–39, no one seems to mind if a person buys less than a controlling share. One need only transfer the claim unconditionally and provide proper notice of the transfer. See FED. R. BANKR. P. 3001(e); see also GROSS, *supra* note 2, at 184–85 (arguing that when large numbers of claims are bought by one entity, other creditors lose power in the case).

¹⁴⁶ See generally Rapoport, *supra* note 2 (arguing throughout her article that there are numerous unrepresented interests in Chapter 11 cases).

interests in bankruptcy cases, and then weigh the costs against the benefits of doing so.

A. Examples of Nonpecuniary Interests and the Contexts in Which They Arise

We need only continue this inquiry if important interests are not being heard in bankruptcy cases. Such interests can take many forms, including those in the examples that follow.

1. San Gobin Continuing Care Center

San Gobin is a nursing home located in a small city and is subsidized by federal funds. Despite the subsidies, changes in health care reimbursement procedures have forced it into the red, and thus into Chapter 11. Among the nursing home's clientele are a large group of elderly persons with long-term, below-market contracts with the debtor, under which these persons prepaid (primarily through federal subsidies) for extended life care at San Gobin. San Gobin provides these residents with two things they cannot obtain elsewhere. First, as a result of the prepayment and the very favorable contracts, they pay almost no monthly charge for services at the home. Second, they get around-the-clock nursing care, which is no longer provided at this level anywhere in the city or surrounding areas. The debtor's new business plan is to "gussy up" San Gobin and turn it into an upscale retirement community. The debtor believes that the mere presence of the subsidized residents will foil the upscale plan, which looks as though it will be highly profitable. Moreover, the below-market contracts are an economic disaster for the debtor and are to be rejected under the debtor's Chapter 11 plan, under the business judgment rule.¹⁴⁷ Although the residents can assert an economic claim for their losses, they cannot get comparable services anywhere in the area, and cannot get such services anywhere for the amount of damages they will receive.¹⁴⁸

¹⁴⁷ The "business judgment rule," which is the standard used to determine whether a debtor may reject an executory contract, merely requires that rejection be financially beneficial to the debtor's estate and creditors. See *In re GP Express Airlines, Inc.*, 200 B.R. 222, 230 (Bankr. D. Neb. 1996); *In re Beare Co.*, 177 B.R. 879, 882 (Bankr. W.D. Tenn. 1994). It is virtually impossible for the nondebtor party to contest rejection. See *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994), *aff'd sub. nom.*, *John Forsyth Co. v. G Licensing, Ltd.*, 187 B.R. 111 (S.D.N.Y. 1995).

¹⁴⁸ The residents' claims will be unsecured claims, and will most likely receive cents on the dollar. See 11 U.S.C. § 365(g) (1994); *Medical Malpractice Ins. Assoc. v. Hirsh* (*In re*

2. *Krupa's Bar and Grill*

Krupa's has operated as a local neighborhood bar and grill since 1931. Located in an old ethnic neighborhood in a large city, it has attracted a local crowd for both food and drink for over sixty years. This past year, Krupa's was hit with two lawsuits for damages caused by customers who left Krupa's "under the influence." In recent years, Krupa's failed to change with the times and to keep closer tabs on drunkenness. It believes that more lawsuits are in the wings. Krupa's was forced to file a Chapter 11 petition to stay alive and ultimately its operations were terminated. While still in Chapter 11, the debtor sought buyers for the business. A local couple bid \$20,000 for the assets and was outbid by a large corporation operating a chain of strip joints. All of this bidder's places of business are operated under the original names of old local businesses, in order to improve the places' images and try to maintain some of the old clientele. The strip joint is willing to pay a hefty price for the assets in order to obtain the assets free of all existing claims, particularly outstanding tort claims that may arise out of Krupa's past conduct. There are no zoning issues. Needless to say, the neighbors believe the strip joint will corrupt the neighborhood. They have organized to challenge the sale, although none are directly affected by it economically.

3. *Fancy Pants*

In the context of a section 363 sale,¹⁴⁹ the debtor receives two competing bids for its manufacturing business, which produces suits and tuxedos. One bidder, a competitor, has offered \$5 million for the plant and other assets and intends to permanently close the plant in order to eliminate competition and enhance its own market share. This is the offer that the debtor has accepted. A competing bid has been received from another bidder, who operates a similar facility abroad. This bidder has offered \$4,600,000 for the same assets, but

Lavigne), 114 F.3d 379, 389 (2d Cir. 1997) (finding that, based on 11 U.S.C. § 365(g), when a contract is rejected, the resulting contract rejection claim is an unsecured claim).

¹⁴⁹ See 11 U.S.C. § 363(b)(1) (1994). Section 363(b)(1) states that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." *Id.* Such property may be sold "free and clear of any interest in such property" if certain conditions are met, with all claims to attach to the proceeds of sale. 11 U.S.C. § 363(f) (1994). If property is sold free and clear of all claims, then one may not sue the purchaser of the property for injuries resulting from the products or actions of the predecessor-seller. See *In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

intends to operate the business at this location, using the existing labor force. The employees argue that the \$4,600,000 bid is the best overall bid because it will save jobs, but they have no contracts or unpaid claims. Under the majority view of standing, the employees have no right to be heard on any issue in the case.¹⁵⁰

B. *Super-Rehabilitation: How the Code Disregards These Interests*

All of these scenarios share certain attributes. All involve pivotal issues in a Chapter 11 case, in which significant nonpecuniary issues are affected. In all cases, if the court concerns itself only with the current economic interests of creditors, then significant harm will be caused to noncreditor third parties. Because of the special privileges bankruptcy provides, some of these interests could not be affected in this way outside bankruptcy. Thus, these results should not be permitted inside bankruptcy either.

Many of the provisions of the Bankruptcy Code that permit these interests to be disregarded are the same provisions that facilitate rehabilitation under the Code,¹⁵¹ creating tension between promoting reorganization and considering noneconomic interests.

1. *San Gobin, Rejection, and Majority Rule*

The way the Bankruptcy Code permits disregard of the San Gobin's residents' rights is quite radical. Specifically, section 365 of the Bankruptcy Code permits any debtor to disavow or reject any contract, and to substitute its performance with a general unsecured claim equal to the resulting contract damages.¹⁵² There is no right to specific performance and very little, if any,

¹⁵⁰ See 11 U.S.C. § 363 (1994).

¹⁵¹ See, e.g., 11 U.S.C. § 363(b)(1994) (allowing sale of assets free and clear of all claims); 11 U.S.C. § 365 (1994) (permitting rejection of executory contracts); 11 U.S.C. § 362 (1994) (limiting lawsuits against bankruptcy debtors). We cannot simply eliminate these provisions, as they are very helpful in facilitating rehabilitation.

¹⁵² 11 U.S.C. § 365 (1994) provides:

(a) Except as provided in sections 765 and 766 of this title in subsections (b), (c), and (d) of this section, *the trustee*, subject to the court's approval, *may assume or reject any executory contract or unexpired lease of the debtor*.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

ability for the nondebtor party to the contract to challenge the rejection.¹⁵³ Thus, under the prevailing standard for rejecting an executory contract under section 365,¹⁵⁴ the business judgment rule,¹⁵⁵ a court can permit the contracts to be rejected despite the fact that the residents will have no place to go.¹⁵⁶

In addition, under the provisions regarding confirmation of a Chapter 11 plan,¹⁵⁷ other creditors and creditor groups have a right to decide whether to kick out the residents and approve the upscale plan. The decision is made by majority or supermajority rule, even though the residents are not only creditors but are affected by the plan to a far greater degree than the other creditors. In this approval process, the size of the claim determines the size of the voice that each creditor has. This makes perfect mathematical sense when the interests being asserted are pecuniary, that is, economic and presently due and owing. When the interests are not pecuniary, however, they are not considered at all in

(A) cures, or provides adequate assurance that the trustees will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

Id. (emphasis added).

¹⁵³ If the residents were parties to what was legally a lease, rather than a contract, their rights would be protected somewhat by § 365(h), which provides that when the debtor is a landlord, the tenant cannot be removed from the premises unless the landlord continues to pay for essential services. See 11 U.S.C. § 365(h) (1994). This contract is probably not a real estate lease because the healthcare services are the most important feature of the contract. See *Bill Watkins v. Air Vermont, Inc.* (*In re Air Vermont, Inc.*), 44 B.R. 440, 444-45 (Bankr. D. Vt. 1984) (discussing in the analogous context of differentiating between a lease and a security agreement, that the primary purpose of the agreement will prevail).

¹⁵⁴ See 11 U.S.C. § 365 (1994).

¹⁵⁵ The business judgment rule leaves it up to the debtor to decide whether rejecting a contract is beneficial. See *In re GP Express Airlines, Inc.*, 200 B.R. 222, 230 (Bankr. D. Neb. 1996); *In re Beare Co.*, 177 B.R. 879, 882 (Bankr. W.D. Tenn. 1994). The nondebtor party has virtually no defense. See *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

¹⁵⁶ Of course, the residents will be paid for their claims; that is, cents on the dollar for their already very reduced rejection claims. These are the claims for which they will have standing. They can speak about how these miniscule amounts will be paid, but not about their lack of a home and healthcare.

¹⁵⁷ See 11 U.S.C. § 1129 (1994).

the confirmation equation.¹⁵⁸ The unique rights created by the Bankruptcy Code in sections 365 and 1129¹⁵⁹ permit results in bankruptcy that could not occur outside bankruptcy.¹⁶⁰ They also allow persons with smaller stakes in the case to decide the fate of those with larger stakes.¹⁶¹

2. *Krupa's Bar and Grill and Short-Order Due Process*

The sale of Krupa's to the strip joint could happen outside bankruptcy, but it most likely could not happen as quickly or with as much protection to the buyer. The complexities of the automatic stay,¹⁶² the provision allowing assets to be sold free and clear of liens and claims,¹⁶³ as well as the fast pace at which bankruptcy cases proceed, will put the neighbors in this case at a severe disadvantage.

Outside bankruptcy, the strip joint company could not buy Krupa's assets without the possibility of being liable for future tort suits resulting from the seller's negligent practices in the dissemination of alcohol.¹⁶⁴ State law

¹⁵⁸ Voting in Chapter 11 is by majority rule, which is determined numerically in two different ways. To be confirmed, a plan must be accepted by two-thirds in amount and one-half in number of each creditor class entitled to vote on the plan. *See* 11 U.S.C. § 1126(c) (1994). While it has been suggested that a balance of competing concerns be used, rather than strict numeric voting, *see* GROSS, *supra* note 2, at 248, this is not the way Chapter 11 currently is written.

¹⁵⁹ *See* 11 U.S.C. §§ 365, 1129 (1994).

¹⁶⁰ While the Framers of the U.S. Constitution sought to establish a legal system that protected minority interests over the collective vote of the majority, *see* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1975 (1990), Chapter 11 plan voting is less kind to minority interests. *See* 11 U.S.C. 1126(c) (1994).

¹⁶¹ The stakes are smaller for creditors than for the facility residents because the inability to find affordable, life-sustaining healthcare is more important than an inability to obtain repayment of a debt. *See, e.g.*, 11 U.S.C. §§ 1114, 1129(a)(13) (1994) (requiring that a debtor who is reorganizing continue to pay employee health benefits under a Chapter 11 plan and indicating that health benefits are more important in some contexts than improving the debtor's financial condition).

¹⁶² *See* 11 U.S.C. § 362 (1994).

¹⁶³ *See* 11 U.S.C. § 363(f) (1994).

¹⁶⁴ If one continues the same enterprise of a prior owner of business assets, the new owners can be liable for suits resulting from the prior owner's acts under state law successor liability principles. *See* State of New York v. N. Storonske Cooperage Co., Inc., 174 B.R. 366, 391 (N.D.N.Y. 1994). However, because bankruptcy permits sales free and clear of all claims, one can eliminate successor liability through a bankruptcy court order so providing. *See* Conway v. White Motor Corp., 885 F.2d 90 (3d Cir. 1989) (holding Volvo not liable in tort as a successor to White Motor Corp.); *In re* White Motor Credit, 761 F.2d 270, 274-75

successor liability claims stand impervious to contractual provisions between the buyer and seller.¹⁶⁵ Under section 363 of the Bankruptcy Code,¹⁶⁶ however, the assets can be sold free and clear of all claims relating to the prior use of the assets, even if the buyer intends to operate a similar business. If the order approving the sale specifically provides that successor liability claims cannot be brought after the sale, the order will usually be upheld.¹⁶⁷

The procedural issues raised by the automatic stay imposed by section 362¹⁶⁸ are also likely to affect the neighbors' rights. Under section 362,¹⁶⁹ one may not bring any litigation against the debtor relating to a prepetition obligation or activity of the debtor.¹⁷⁰ Moreover, litigation relating to a postpetition obligation must be brought before the bankruptcy court, rather than another court. Although one technically could bring a postpetition action against the debtor in another forum, the bankruptcy court can enjoin such a suit as an interference with the ongoing rehabilitation efforts of the debtor.¹⁷¹ Even though a good attorney might be able to convince the bankruptcy court to allow a state court suit to proceed, in which injunction of such a sale might be sought, she may not be able to achieve this result.¹⁷² Thus, the most likely forum for

(6th Cir. 1985) ("All pre-petition claims and post-petition claims against White which have not been filed with the Bankruptcy Court are barred by the statute and the orders of the lower courts.").

¹⁶⁵ See *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585-87 (4th Cir. 1996) (holding that the bankruptcy court can extinguish successor liability claims by entering a "free and clear" order pursuant to 11 U.S.C. § 363(f)(5)); *In re White Motor Credit Corp.*, 761 F.2d at 274-75 (same). But see *In re Savage Indus., Inc.*, 43 F.3d 714, 722-23 (1st Cir. 1994) (holding that state successor liability claims are not extinguished when the plaintiff had no notice of the sale, which is typical of claims that arise after the sale has been approved).

¹⁶⁶ See 11 U.S.C. § 363 (1994) (detailing when a trustee may sell property free and clear of any interest other than the estate).

¹⁶⁷ See *In re White Motor Credit Corp.*, 761 F.2d at 274-75.

¹⁶⁸ See 11 U.S.C. § 362 (1994).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See 11 U.S.C. § 362(a)(2) (1994). Some might argue that as long as any forum is available, there will not be a due process problem. There may be a due process problem, however, if any other forum would be unable or unwilling to move as quickly as the bankruptcy court. Moreover, all other actions are stayed at least temporarily. See *id.*

¹⁷² One may wonder why a judge would permit such litigation to be pursued while the debtor is trying to put its affairs in order. Moreover, the neighbors may be unable to find a good attorney on such short notice in this highly specialized area. They also may run into difficulties raising funds for attorney's fees. As one scholar has noted, "[m]echanisms for protecting . . . entitlements may not exist—and for two reasons: first, the legislature may not

the neighbors' complaints is bankruptcy court and not another forum that would otherwise be available if not for the bankruptcy. As will be discussed in Part III.C, however, the bankruptcy forum does not know exactly what to do with the neighbors' interests.¹⁷³

The problems posed by certain Code provisions, such as facilitative sale provisions and litigation issues relating to the automatic stay are further exacerbated by the speed with which a bankruptcy sale can be approved.¹⁷⁴ Again, this fact about bankruptcy is what makes it so effective—not to mention appealing—to buyers, sellers, and creditors. However, it will be very hard for the neighbors to get organized and obtain representation before the sale is approved. It is unlikely that there will be much time to accomplish anything in another forum before the bankruptcy court rules on the sale. In the bankruptcy forum, it is unlikely that the neighbors' concerns about a deteriorating neighborhood will be taken seriously, or considered at all, in deciding whether to approve the sale to the highest bidder.

The neighbors do not hold bankruptcy claims. Even if they merely wanted to organize their own bid, the brief twenty-day notice of sale required by the Bankruptcy Rules will provide little time to do so. Thus, the entire sale could be approved before their interests have ever been considered. Bankruptcy was never intended to create greater rights in creditors than they receive under state law. Yet, Krupa's bankruptcy could create such rights at the expense of third parties.

3. *Fancy Pants and the State of the American Wage Earner*

a. *The Fancy Pants Workers*

The employees of Fancy Pants are, in some respects, far better protected in bankruptcy than the neighbors of Krupa's or the residents of San Gobin.

have determined who has a right of action; second, the holders of entitlements may not have the funds to press their claims in the bankruptcy case." See Rapoport, *supra* note 2, at 837 n.224.

¹⁷³ See *infra* notes 223–303 and accompanying text.

¹⁷⁴ Bankruptcy Rule 2002 requires only twenty days notice of most matters in a Chapter 11 case. See FED. R. BANKR. P. 2002. This rule regarding short notice is beneficial to everyone in the case except for the neighbors. It makes the proceeding quicker and less expensive for creditors and the debtor, but could make it very difficult for the neighbors to obtain competent representation in time to stop the sale.

Employees already are entitled to a host of special privileges in bankruptcy.¹⁷⁵ They receive special priority for a portion of unpaid wages and benefits,¹⁷⁶ their benefits must be continued in a reorganization plan,¹⁷⁷ and, if they are unionized, their collective bargaining agreements may not be rejected unless stringent standards are met.¹⁷⁸ Moreover, unlike the parties seeking to pursue nonpecuniary interests in the other two examples, the employees of Fancy Pants are not necessarily worse off as a result of the bankruptcy.¹⁷⁹

However, many workers can be fired for no reason at all both in and outside bankruptcy.¹⁸⁰ In light of this fact, it is not surprising that employees generally have no right to be heard with respect to the future of their jobs.¹⁸¹

¹⁷⁵ See, e.g., 11 U.S.C. § 507 (1994) (providing priority treatment for wages and benefits); 11 U.S.C. § 1113 (1994) (making it very difficult to reject a collective bargaining agreement); 11 U.S.C. § 1114 (1994) (requiring the maintenance of employee benefits while in Chapter 11).

¹⁷⁶ See 11 U.S.C. § 507 (1994).

¹⁷⁷ See 11 U.S.C. § 1114 (1994).

¹⁷⁸ See 11 U.S.C. § 1113 (1994). In *Wheeling-Pittsburgh Steel Corp. v. United Steel Workers of America, AFL-CIO-CLC*, 791 F.2d 1074 (3d Cir. 1986), the court emphasized that the requirements of § 1113(b)(1) are in the conjunctive. Accordingly, a Bankruptcy Court must determine whether a debtor's proposal both "provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all the creditors, the debtor and all affected parties are treated fairly and equitably." *Id.* at 1086 (citing 11 U.S.C. § 1113(b)(1)(A) (1994)).

The Court of Appeals specifically determined that the term "necessary" within the meaning of § 1113(b)(1)(A) is synonymous with the term essential. Thus, only those modifications to a collective bargaining agreement limited to the short-term goal of preventing a debtor's liquidation, as opposed to broader modifications intended to insure the long-term economic health of the debtor, will be permitted. See *id.*

¹⁷⁹ When businesses are sold outside bankruptcy, employees do not necessarily receive any special treatment.

¹⁸⁰ See Mark A. Fahleson, *The Public Policy Exception to Employment At Will: When Should Courts Defer to the Legislature*, 72 NEB. L. REV. 956, 959 (1993) (discussing the evolution of employment at will); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994) (same).

¹⁸¹ The Bankruptcy Code does provide some protections to workers with respect to future employment. An example is the provisions protecting collective bargaining agreements. See 11 U.S.C. § 1113 (1994). Additionally, the debtor must comply with certain nonbankruptcy laws protecting workers. See, e.g., Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1994) (known as "WARN Act" and requiring that employers provide a 60 day notice of plant closings and mass layoffs); see also *Hotel Employees Int'l Union Local 54 v. Elsinore Shore Assoc.*, 724 F.Supp. 333, 336 (D.N.J. 1989) (upholding WARN Act obligations in bankruptcy).

Yet the consequences of accepting the first offer for Fancy Pants are severe with respect to both Fancy Pants's work force and other members of the community. Plant closings affect large numbers of people and should be avoided under most circumstances.¹⁸² Obviously, this does not mean that a court should accept a \$500,000 offer that saves jobs over a \$5,000,000 one that does not. However, some balance of competing interests is needed. Enormous dollar differences in bankruptcy may require that the highest offer be accepted. When the differences are not so large, balancing becomes necessary. An examination of employee interests illustrates how expanding bankruptcy court standing could have a positive influence on areas of law beyond bankruptcy.

b. *Worker Rights in General: A Dire Call for Action*

[T]hose who have nothing to sell but their labour remain in the weakest possible bargaining position.¹⁸³

¹⁸² Obviously, there are exceptions, for example, if the plant is causing extensive pollution, that is harming local (or not so local) residents. *See, e.g.,* Heidt, *supra* note 25, at 1091-92 (discussing the options available to balance the goals of saving jobs with that of saving the environment and claiming that such decisions must be made by the legislature).

¹⁸³ E. F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* 67-68 (1973). As the court in *Arthur Murray Dance Studios v. Witter*, 105 N.E. 2d 685, 704 (Ohio Ct. C.P. 1952) stated:

The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.

See id. at 704.

The world of bankruptcy scholarship has grown fond of the bargain theory and model. Some scholars rely heavily on the concept of freedom to bargain and contract. *See, e.g.,* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1147-48 (1979) (stating that secured creditors bargain for collateral, and unsecured creditors respond to their lack of collateral by demanding a premium or higher interest rate). Other scholars doubt that parties actually bargain for their position in a debtor's debt structure. *See* Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1896 (1994) (stating that many unsecured debt holders do not agree to issue credit to the debtor but are instead involuntary creditors such as tort victims, former spouses, government agencies, educational lending agencies, health care providers, tax authorities, landlords, and utilities). The questions become: Who bargained for what? Should she be held to the bargain? Did she have an opportunity to bargain?

I have argued that a corporation's fiduciary responsibilities run to parties other than shareholders.¹⁸⁴ If these fiduciary responsibilities exist, they extend to a corporation's employees, both inside and outside bankruptcy.¹⁸⁵ In his article, *The Responsible Board*, Wall Street attorney Ira Millstein devotes much of his discussion to ways in which corporations can reduce the harm caused by the replacement of human capital with technological efficiencies.¹⁸⁶ Millstein acknowledges that when a course of action causes serious dislocation, the corporation is expected to consider alternatives.¹⁸⁷

Corporate America, however, does not seem to be getting the message.¹⁸⁸ When it comes to wages and employee benefits, American workers are on a downward spiral.¹⁸⁹ Workers now receive less wages for the same work than

Along the same lines, many employees with nonpecuniary interests to assert in bankruptcy did not bargain for their position with the debtor. *See, e.g.,* Shannon Browne, Note, *Labor-Management Teams: A Panacea for American Businesses or the Rebirth of Laborer's Nightmares?*, 58 OHIO ST. L.J. 241, 269 (1997) (discussing unions' ability to equalize bargaining power); Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U.L. REV. 139, 166-74 (1993) (noting that even professional and managerial workers often lack real bargaining power); *see also* Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 852 (1992) ("Most individuals enter employment contracts with hopes and dreams. Few enter with the end of the relationship clearly in mind.").

¹⁸⁴ *See supra* Part II.B.

¹⁸⁵ *See generally* Millstein, *supra* note 49, at 408-17 (discussing corporate responsibilities to the public and employees).

¹⁸⁶ *See id.* (discussing the inevitability of downsizing in light of technological efficiencies and providing some examples).

¹⁸⁷ *See id.* at 413. He then suggests several alternatives. One possibility is that the board consider whether the proposed layoffs are necessary at all, and if so, whether there is a way to soften the blow. For example, during the Depression, Sears and Kellogg cut all working hours by 25% to avoid layoffs. *See id.* Another option is to give company stock to those being laid off. *See id.* at 414. Still another approach, recently taken by AT&T, is to acknowledge publicly that the layoffs are not merit-based, publicly praise the former workers, and provide them with job counselling and new training. *See id.* Additionally, companies can offer continuing health care benefits and portable pension plans. *See id.*

¹⁸⁸ *See generally* WOLMAN & COLAMOSCA, *supra* note 60 (discussing the propensity for companies to seek cheap labor outside the United States, thus reducing wage earning capacity among Americans).

¹⁸⁹ *See id.* at 168-83.

For those who earn their living from work, real wages (money wages corrected for inflation) have been stagnant since 1973 [A]nnual wages held up better than did hourly wages, only because there was rapid growth in the number of hours each worker

ever before on a standard-of-living basis.¹⁹⁰ They also have far less job security.¹⁹¹ There is more downsizing, more economic uncertainty, and far fewer safety nets.¹⁹² Even some mainstream economists now acknowledge that

put in, as the growth rate in the amount of capital supplied to each worker declined, and production became more labor intensive.

Id. at 169. Moreover, U.S. wages have fallen more than 20% in the last 22 years. *See* David Pearce Snyder, *The Revolution in the Workplace: What's Happening to Our Jobs?*, FUTURIST (Mar.-Apr. 1996), at 8-13. Today nearly one-fifth of America's 85 million full-time employees earn less than a poverty wage; for people between the ages of 18 and 24, the numbers are even more shocking: 47% hold full-time jobs that pay less than a poverty income. *See id.*

¹⁹⁰ *See id.*; Louis Uchitelle & N.R. Kleinfeld, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A1. According to these authors:

More than 43 million jobs have been erased in the United States since 1979 Many of the losses come from the normal churning as stores fail and factories move. And far more jobs have been created than lost over that period. But increasingly the jobs that are disappearing are those of higher-paid, white-collar workers.

Id. Moreover, only thirty-five percent of laid-off workers find jobs that pay as much as or more than their prior job. *See id.* at 26.

¹⁹¹ *See* WOLMAN & COLAMOSCA, *supra* note 60, at 70-73. Reengineering has become synonymous with fear of job loss. Wage stagnation causes further workplace degradation which is exacerbated by a complete lack of job security in existing corporate America. *See id.*

¹⁹² *See* Elizabeth Kolbert & Adam Clymer, *The Politics of Layoffs: In Search of a Message*, N.Y. TIMES, Mar. 8, 1996, at A1, A22 (evaluating political approaches to the downsizing problem and what role economic concerns would have on the outcome of the 1996 Presidential election); *see also* WOLMAN & COLAMOSCA, *supra* note 60, at 57-85; Diane Crispell, *Replacing Displaced Earnings*, AM. DEMOGRAPHICS, Sept. 1997, at 39-40 (stating that three in ten workers displaced between 1993 and 1995 earned at least 25% less than they did before being laid off, and that the number is even greater among older employees). Another obvious change in the workforce is the proliferation of part-time work, as demonstrated by the UPS strike. *See* Robert T. Garrett, *Teamsters to Return, Strike Gives Lift to Labor Movement*, COURIER-JOURNAL (Louisville), Aug. 20, 1997, at A1 (noting that many companies, such as Kmart, Home Depot, and Sears asked President Clinton to intervene to stop the UPS strike because they use a lot of part-time workers and did not want the issue highlighted). As one journalist noted:

Working people have every reason to be nervous. In California, job loss in the last decade has been concentrated in high-skilled, high-wage industries like aerospace, defense, heavy manufacturing and communications. Meanwhile, if you're looking for the next decade's growth industries, you'll go to work as a relatively low-wage cashier, janitor, retail sales clerk or waiter. More and more, new jobs don't provide the same

our unique form of capitalism has spun out of control, with more and more national resources being devoted to investment capital and fewer to human capital.¹⁹³

It seems that American corporations would rather maximize profits—which incidentally are at an all-time high—than invest in the future of American wages.¹⁹⁴ The situation is further exacerbated by the world banks, which avoid inflation at all costs, even if doing so permanently deflates wages.¹⁹⁵ This

security as the old ones. Few workers needed the UPS strike to teach them that the jobs of the '90s are increasingly temporary or part-time.

The rich get richer and the rest of us take on a second job just to stay in place. It's not surprising that bankruptcies are up and credit card debt is at record levels.

Art Pulaski, *If This Is Prosperity, Where's Mine?*, L.A. TIMES, Sept. 1, 1997, at B5.

¹⁹³ See WOLMAN & COLAMOSCA, *supra* note 60, at 17–32. Although profits for American corporations are higher than ever before, average Americans are not benefitting. *See id.* Rather, the end of the cold war has made cheaper labor available world-wide, severely minimizing the value of American labor. *See id.* at 23. In the post-cold war information age, labor and capital need no longer remain together. Instead, corporations can spend more purchasing fixed assets abroad, to be used by foreign labor. *See id.* at 23–29.

¹⁹⁴ See Felix Rohatyn, *Clinton's Growth Agenda*, WALL ST. J., Sept. 16, 1996, at A18 (explaining that corporate America may want to avoid high growth and low unemployment to avoid potential inflation). The problem of downsizing and the decline of well-paying jobs is described in statistical detail in Geman, *supra* note 47, at 371–75.

¹⁹⁵ Central banks such as the Federal Reserve in the United States and Bundesbank in Germany

are allowing global capital to run wild. . . . Their analysts are quite willing to tolerate growth rates of over 5 percent per year in emerging countries while refusing to condone fast growth in the industrial world if the perceived threat of even the slightest whiff of inflation is a consequence. Instead of balancing the interests of those who owe money and those who are owed money, they have consented to run the economy of the industrial world in such a way that the interests of debtors—most young working families, no matter how high their income from work may be—are sacrificed to the interests of creditors—the bankers and people who live, and have lived for a long time off capital invested in the bond and equity markets.

WOLMAN & COLAMOSCA, *supra* note 60, at 142.

inevitably favors creditors over debtors,¹⁹⁶ who have difficulty paying debts with unexpectedly stagnant incomes.¹⁹⁷

Regardless of the causes, we are witnessing the worst of American employment policies, policies that threaten to make the vast majority of the American workforce obsolete.¹⁹⁸ American corporations no longer need American workers,¹⁹⁹ which has caused what one author has described as a "decoupling or inversion of corporate needs and human needs."²⁰⁰ These trends cannot be economically efficient, given the staggering costs of such a policy to society as a whole.²⁰¹ According to William Wolman and Anne Colamosca, authors of *The Judas Economy*, these costs include not only lower incomes and standards of living but also

"the moral upheaval of losing a community, of trust betrayed. While other studies have documented it among the laid-off, I found it as strongly among those who remained employed." In an analysis of an actual company that he renames "Glover," [Rutgers University labor expert Charles] Heckscher finds that among the people who stayed on after the downsizing, the changes were "deeper, both harder to see and more profound. Along with cost and waste, the transformation also eliminated, or at least damaged, the links among people The organization therefore became more rigid and bureaucratic than ever before."²⁰²

¹⁹⁶ I recognize that this statement is simplistic and overstated. In reality, most creditors are also debtors to other creditors. My statement refers primarily to "institutional" creditors, who clearly benefit at the expense of individual debtors.

¹⁹⁷ See WOLMAN & COLAMOSCA, *supra* note 60, at 7, 179. Americans who wish to maintain their standard of living in light of reduced wages can do so only by taking on more and more debt, thereby further reducing disposable income to an all-time low. *See id.* at 179.

¹⁹⁸ *See id.* at 107-38 (stating that even elite workers, who in the past had far fewer reasons to fear job displacement, are now experiencing less job security, downsizing, and increased unemployment rates).

¹⁹⁹ *See id.* at 87-106 (discussing the huge number of educated workers available to American companies in India alone).

²⁰⁰ *See* Geman, *supra* note 47, at 379. Geman refers here to the inversion of the corporation's initial purpose, which is to serve the public good, and its current role which often is to subordinate the needs of individuals and communities to the needs of corporations.

²⁰¹ *See id.* at 112; *see also* Rick Bragg, *Big Holes Where the Dignity Used to Be*, N.Y. TIMES, Mar. 5, 1996, at A1.

²⁰² *See* WOLMAN & COLAMOSCA, *supra* note 60, at 112 (citing CHARLES HECKSCHER, WHITE COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING 168 (1995)). This in turn has affected overall productivity. *See id.* Another

People naturally do not perform at their highest level when they are under stress, which is why some scholars and commentators believe that workers in many other countries have become more productive than American workers.²⁰³ This is inefficient on a number of fronts, although efficiency itself seems trivial in light of the resulting human condition.

We do not need an economist to confirm these work conditions. We have seen them ourselves. Nor do we need an economist to tell us that a national condition such as this can only get worse; economist Franz Schumacher

author agrees, noting that layoffs are harmful to both those being fired and those doing the firing:

An executive recruiter reported visiting a manager who had just gone through several rounds of firing immediate subordinates. Previously a strong take-charge executive, he was now smoking, had lost weight, was unable to look the recruiter in the eye, and seemed extremely nervous. For another executive who had previously eliminated thousands of jobs, the need to put several thousand more former colleagues out on the street resulted in a loss of appetite and difficulty sleeping. He began breaking out in spontaneous fits of crying and one day couldn't get out of bed.

Those who achieve the pinnacles of financial and professional success in America seldom lack for physical comforts. They are learning, however, that no amount of money can buy peace of mind, a strong and loving family, caring friends, and a feeling that one is doing meaningful and important work.

DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 243 (1995).

²⁰³ See WOLMAN & COLAMOSCA, *supra* note 60, at 97 (discussing the high energy of Indian workers compared to American workers). U.S. productivity for the hundred-year period following the Civil War has averaged a 2.2% increase per year. *See id.* at 73. From the fourth quarter of 1993 through the fourth quarter of 1995, the average yearly gain has been 1.1%. *Id.* While productivity has risen in the first quarter of 1997 to 2.0%, *see* Michael Mandel et al., *How Long Can This Last?*, BUS. WK., May 19, 1997, at 31, productivity increases in other industrialized nations including Germany, France, Italy, and Britain have been equal to or better than the U.S. numbers for the past five years. *See* Gene Koretz, *America's Edge in Wages*, BUS. WK., June 30, 1997, at 32.

The notion that American workers are not the *most* productive in the world is controversial, even shocking to some. *See, e.g.,* Michael Avramovich, Note, *Intercompany Transfer Pricing Regulations Under Internal Revenue Code Section 482: The Noose Tightens on Multinational Corporations*, 28 J. MARSHALL L. REV. 915, 918 n.14 (1995) (quoting secretary of Commerce Ron Brown as stating that "American workers are the most productive in the world"); Paul R. Verkuil, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221, 1221 (1994) (stating that American workers are the most productive in the world). Because there is little job security in the United States, compared to other industrialized nations, many people think that workers are far more likely to work harder to ensure continued employment. *See* WOLMAN & COLAMOSCA, *supra* note 60, at 71. This is not the way it seems to be working out, however. *See id.* at 97.

explained why, long before corporate downsizing began.²⁰⁴ Meaningful life work is necessary on a large scale for the long-term sustainability of meaningful human existence.²⁰⁵ Human capital is perhaps the most sustainable form of capital, although its value is neither realized, recognized, nor appreciated.²⁰⁶

²⁰⁴ The Gross National Product may rise rapidly even though people may find themselves oppressed by increasing frustration, alienation, insecurity, and so forth. *See* SCHUMACHER, *supra* note 183, at 27 ("After a while, even the Gross National Product refuses to rise any further . . . because of a creeping paralysis of non-cooperation, as expressed in various types of escapism on the part, not only of oppressed and exploited, but even of highly privileged groups.").

²⁰⁵ *See id.* As Schumacher noted:

If a man has no chance of obtaining work he is in a desperate position, not simply because he lacks an income but because he lacks this nourishing and enlivening factor of disciplined work which nothing can replace. A modern economist may engage in highly sophisticated calculations on whether full employment "pays" or whether it might be more economic to run an economy at less than full employment so as to ensure a greater mobility of labor, a better stability of wages, and so forth. His fundamental criterion of success is simply the total quantity of goods produced during a given period of time.

. . . This is standing the truth on its head by considering goods as more important than people

Id. at 51. *See also* Lewis D. Solomon, *Perspectives on Human Nature and Their Implications for Business Organizations*, 23 FORDHAM URB. L.J. 221, 236 (1996) (stating that society's obsession with economic growth thwarts personal fulfillment and decreases employees' fulfillment); KORTEN, *supra* note 202, at 243.

²⁰⁶ *See* WOLMAN & COLAMOSCA, *supra* note 60, at 77 (noting that corporations can choose between using more human capital or more currency capital). One scholar has suggested that employers do not invest more heavily in human capital because existing doctrinal limitations on enforceability of the assignment of human capital discourage, or at least fail to encourage, such investment. *See* Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 387 (1993). Sterk argues, for example, that employers would be far more likely to invest in human capital in the form of training, higher wages, and more job security, if they could in turn enforce covenants not to compete. *See id.* at 412. As Sterk explains:

In the employment context, alienability of human capital is more limited than alienability of more traditional property in at least two ways. First, a contract to work for a particular employer is not specifically enforceable: an employer who attempts to "buy" an employee's services for a period of time may not secure "property-rule" protection of the "property" he has attempted to purchase. Second, even more limited protection—the right to prevent a former employee from working for a competitor—is available only when the firm can persuade the court of a strong economic justification for enforcing the bargain. The existence of a bargain that both parties apparently believed beneficial is not by itself enough to secure judicial enforcement. These restrictions on a

Although the problem of noneconomic interests in bankruptcy certainly pales in comparison to labor conditions in general, the two are not entirely unrelated.²⁰⁷ Large Chapter 11 cases did not cause the reduced job status many Americans now face, nor can implementing new procedures in these cases solve these complex problems. Implementing such procedures might, however, avoid making the problem worse.

This is not to say that employees should run Chapter 11 cases. They should merely have a right to be heard on issues affecting their future employment. The plight of workers, and their resulting need for a voice in bankruptcy proceedings, was recently recognized by the National Bankruptcy Review Commission, which proposed that employee committees be appointed to represent these interests.²⁰⁸ Regardless of the particular mechanism used, this

person's ability to alienate his own human capital have been justified in part by the need to discourage anticompetitive behavior, in part by the need to protect employees from the greater bargaining power of employers, and, most significantly, by the need to protect individual freedom. None of those justifications, however, is entirely persuasive.

Id. Perhaps the law in other areas, such as employment law, should be readjusted to encourage a greater investment in human capital.

²⁰⁷ Large numbers of employees are affected by bankruptcy. The number of employees and retirees affected by bankruptcy filings in the United States is not counted, but several figures provide insight into the dimensions of this group of individuals. The following table shows the number of employees in some of the largest bankruptcies filed over the past several years:

<u>Company Name</u>	<u>Number of Employees</u>
Restaurant Enterprises Group	36,750
Carter Hawley Hale Stores	36,000
Hill's Department Stores	29,600
Farley	28,900
Best Products	24,900
Pan Am	<u>24,600</u>
Total	180,750

See GROSS, *supra* note 2, at 81.

²⁰⁸ Recognizing the precarious position of employees in Chapter 11 cases, the NBRC appointed a working group to consider how to increase employee participation in bankruptcy cases. As Commissioner Babette Ceccotti stated:

Given the well-established purpose of Chapter 11 to preserve jobs, participation by employees and their representatives in the reorganization process should be accepted and encouraged. Instead, representatives of employees and retirees and employee benefit funds have faced impediments to active participation in bankruptcy cases despite their recognized status as creditors and parties in interest. These obstacles take many forms,

right to be heard would be fairly easy to provide, and far less radical than many proposed solutions to workers' plights. For example, after U.S. Steel closed its two plants in Youngstown, Ohio, and refused to sell the plant to its workforce at a fair market price, Professor Joseph Singer argued that a new property right should be recognized in the workers, based on relational contract theories and joint production and ownership of the plant.²⁰⁹

What I propose here is far more modest: employees' right to be heard on matters involving their future employment. At this time, I am not proposing that any other noncreditor group receive an *automatic* right to be heard, nor do I believe that employees should have open-ended representation and standing to speak on every issue in a case, as I understand the National Bankruptcy Review Commission's proposal to do. Instead, I propose a limited representation for employees through appropriate Bankruptcy Code amendments.²¹⁰

such as a lack of notice of a bankruptcy filing, failure to include debts owed to employees and benefit funds of the debtor's schedules and skepticism by the U.S. Trustee's office in the creditors' committee appointment process regarding claims held by unions or benefit funds. Employees not represented by a labor organization face additional obstacles due to the lack of collective representation. Because reorganizations typically involve significant business decisions affecting employees, the bankruptcy process should more readily accommodate participation by employees and their representatives.

See NBRC Report, *supra* note 109, at 502. The committee report acknowledged that when employees were also creditors, there was less of a need to provide additional representation. The NBRC later implies that appointing a committee for employees is an appropriate solution, if employees are not otherwise able to participate (e.g., if they are not creditors). *See id.* at 506.

²⁰⁹ As will be discussed in subsection C.1.a, we ultimately may decide that a new property right should be recognized in certain claimants. *See infra* notes 230–40 and accompanying text. *See generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (arguing that employees should be entitled to new property rights based on the contributions they have made to the enterprise in which they have worked).

²¹⁰ The NBRC's report does not specify on which issues employees may be heard. *See* NBRC Report, *supra* note 109, at 455 (providing that "employee creditor committees be encouraged in appropriate circumstances as a mechanism to resolve claims and other matters affecting the employees in a Chapter 11 case," but specifying no particular limitation on the participation of such committees). While forming employee committees seems to be a good idea, providing employees standing on all issues in every case would be too broad in my opinion. Instead, Bankruptcy Rule 2018 could be amended specifically to provide that employees have the right to be heard on any issue involving their future employment. This rule currently gives unionized employees the right to be heard, through a representative, but only in connection with confirmation of a Chapter 11 plan. *See* FED. R. BANKR. P. 2018(d). The rule does not apply in any context other than Chapter 11 plan confirmation. *See id.*

Although unionized employees already have a right to be heard under Bankruptcy Rule 2018 in connection with a plan or reorganization, they do not have a right to appeal the confirmation order.²¹¹ Thus, I propose that the rights of workers to be heard on issues affecting future employment be expanded in three ways. First, the right to be heard in connection with the plan should extend to all employees, not just unionized workers.²¹² Second, there should be a right to appeal any court order relating to an issue of future employment, just as any other order can be appealed by any party with standing.²¹³ Finally, and perhaps most important, the right to be heard should extend to sales of a debtor's assets. Asset sales are very common in bankruptcy, perhaps more common than continued ownership of the business by existing shareholders.²¹⁴ If the business is being or could be sold as a going concern, employees might have an opportunity to continue their employment.²¹⁵ As a result, the issue of future employment probably arises more frequently in the context of asset sales than any other bankruptcy issue. Employees should have an automatic right to be heard on the issue of their future employment, in order to avoid exacerbating the current employment situation in this country.

²¹¹ See FED. R. BANKR. P. 2018(d) ("A labor union or employees' association which exercises its right to be heard under the subdivision shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law."). No other law provides such a right, leaving even unionized employees with no right to appeal the court's order approving a plan over their objections.

²¹² See *id.* (In a Chapter 11 case, "a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees."). This phrase has been interpreted as limiting the right to be heard to organized employees, although under the former section of the Act most similar to this rule, § 206, all employees had a right to be heard. There is no indication in the legislative history of Rule 2018 that Congress intended a major departure from § 206. See S. REP. NO. 95-989, at 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

²¹³ This right must be specifically provided because, for some reason, the right of unionized workers to appeal a confirmation order on an issue related to their employment was specifically excluded from Rule 2018. See FED. R. BANKR. P. 2018. There is no legislative history indicating why the typical right of appeal was eliminated. In fact, the only legislative history with respect to Rule 2018 relates to its procedures regarding intervention. See S. REP. NO. 95-989, at 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902; *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 451 (3d Cir. 1982).

²¹⁴ See Warren, *supra* note 27, at 788.

²¹⁵ Obviously, if the assets must be sold piecemeal to more than one buyer, and the company will not remain operational, employees could not maintain their current employment in any event. In a clear-cut case, for example, where no buyer can be found for the going concern business after a reasonable time, employees may not need a right to be heard.

This suggested modification is modest, particularly when compared to other proposals such as shifting our definition of a bankruptcy claim.²¹⁶ When Professor Singer suggested that workers employed by U.S. Steel receive a recognized property right in the steel plants,²¹⁷ there was no real alternative to allowing the plant to close.²¹⁸ U.S. Steel did not wish to sell its plant and no one could force it to do so.²¹⁹ In the Fancy Pants example, however, the business in issue was for sale. Moreover, there was a second offer for the assets that was close in size to the larger offer.²²⁰ Thus, there was an alternative means of taking workers' rights into account that was not present in the U.S. Steel case.²²¹ The proposed amendments could make a real difference to large numbers of workers affected by large Chapter 11 cases and to the communities in which they work.

No global solution to the state of American workers appears on the horizon.²²² But there may be small steps that could improve the situation. As

²¹⁶ See *infra* note 234 and accompanying text.

²¹⁷ See *supra* note 209.

²¹⁸ By this, I mean no alternative under existing law. Professor Singer argued in favor of creating a new property right in the enterprise, in favor of the workers. See *id.* at 619. However, unlike a typical business in Chapter 11, the plants involved in the U.S. Steel case were not for sale, and the presiding judge found no justification for forcing their current owners to sell them involuntarily. Moreover, because the assets were not for sale, there was no competing or second bid that could be accepted in order to keep the business operational.

²¹⁹ See *id.* at 620. Although both the district and circuit court judges felt the company had a moral obligation to do so, neither felt there was a legislative or common law precedent to force the company to do so. See *id.*

²²⁰ See *supra* notes 149–50 and accompanying text.

²²¹ Because anyone with money or access to money can bid on a debtor's assets, workers already have the right in bankruptcy to do what Singer proposed, namely to buy a debtor's assets. They do not have any right to request additional time to put together such a bid, however, or the right to argue that saving local jobs will add value to a bid, which I believe they should have.

²²² For a discussion of some thought-provoking new ideas addressing these problems, see generally Geman, *supra* note 47, at 402–05. Geman suggests that the rights employees generally receive, such as the right to minimum wage, be expanded to include health care rights, which would be portable from job to job. She also suggests that identity and physical communities of workers be formed, through which workers can collectively negotiate workplace benefits, form skills training centers and other network communities, and discuss other aspects of employment. These communities could fill the void left by many unionized jobs that have been eliminated, see *id.* at 370 n.6, and address the concerns of a much larger percentage of the workforce. While these suggestions may seem somewhat idealistic and may produce little immediate change in the workplace, over time they could improve the workplace.

bankruptcy judges, practitioners, legislators, and scholars, we can assist in making small changes in the way American workers are treated—changes that could be significant over the long term. The question is how best to consider these employee and other interests in the context of the existing bankruptcy system.

C. *Voices in the Wilderness*

Although this Article has discussed nonpecuniary interests and why they should be heard in bankruptcy proceedings, it has not identified the underlying purpose for giving nonpecuniary interests a voice in Chapter 11 cases.²²³ How will this opportunity of expression provide more substantive rights? Should we merely hear how these nonpecuniary rights are being affected? Should the goal be to compensate or credit²²⁴ persons for their losses or are there methods of considering these interests that fall between these extremes? Among the options available for addressing these unconventional claims in bankruptcy are: (1) converting these nonpecuniary rights into pecuniary rights, by redefining property rights and liabilities, and then compensating persons for their newly-pecuniary losses;²²⁵ (2) weighing nonpecuniary rights on equal footing with pecuniary rights, for the limited purpose of hearing these positions;²²⁶ (3) providing a voice in the proceeding for its own sake;²²⁷ or (4) mandating consideration of these interests as long as doing so does not interfere with pecuniary interests.²²⁸

²²³ At least one judge has found it acceptable to consider public interests without identifying a particular purpose or method for doing so:

It is not necessary for present purposes to define exactly when, how, and to what extent the consideration of the public interest may be a determinative factor in the conduct and the resolution of these reorganization proceedings. It suffices to note that it is at least arguable that the public interest factor still must be considered by the reorganization court in a case having a manifest public impact.

In re Public Serv. of New Hampshire, 88 B.R. at 556 (Yacos, Bankruptcy J.) (footnotes omitted).

²²⁴ In most situations, such interests would not actually be *paid*, but the holders would instead receive credit for their interests that could be balanced against the economic claims of creditors.

²²⁵ See *infra* notes 230–69 and accompanying text.

²²⁶ See *infra* notes 270–82 and accompanying text.

²²⁷ See *infra* notes 283–97 and accompanying text.

²²⁸ See *infra* notes 298–303 and accompanying text.

1. *Redefining Property and Debt*

To ask courts to consider nonpecuniary interests in bankruptcy is to ask them to compare apples and oranges. Although it is easy to suggest in the abstract that courts consider nonpecuniary interests when making decisions, it is far more difficult to provide specific guidance to courts regarding how this should be done.

Under existing law, courts may not make decisions that benefit nonpecuniary interests, if the result will be a lower recovery for existing creditors, without violating the existing priority system.²²⁹ In the example of the two bids for Fancy Pants, the courts could not accept the lower bid if it reduced recovery to creditors. Yet the overall economic benefits to the community in which Fancy Pants operates would be far greater if the lower bid were accepted. Over time, far more dollars might be created through continuing employment, which would make their way back into the local community. Other economic benefits also would be realized. As discussed previously, job displacement has high societal costs, many of which are borne by the general public, even at times when social welfare systems are on the decline. Given these realities, in order to give nonpecuniary interests proper treatment, we may need to change the way in which we define assets and liabilities. We may simply be defining property and debt in a far too limited way.

a. *Singer's Reliance Interest in Property*

One way to create a system that considers a worker's right to continued employment is to define that right as a property right.²³⁰ Professor Singer proposes such a shift in the definition of property.²³¹ He argues that when U.S. Steel closed its two Youngstown, Ohio plants, it terminated an employment relationship that had developed over a long period of time—a relationship upon

²²⁹ See 11 U.S.C. § 507 (1994). The Code measures success primarily in terms of "maximum payouts to creditors from the available assets which are to be distributed according to the Code priority scheme." Hon. Leif M. Clark, *What Constitutes Success in Chapter 11?: A Round Table Discussion*, 2 AM. BANKR. INST. L. REV. 229, 233 (1994) (quoting Hon. Robert C. McGuire). Consequently, if a court considers the losses of various community or employee interests to be valued at \$400,000, the court apparently may not—without the kinds of adjustments to the law suggested in this Article—deprive existing creditors of any dollars in order to take the \$400,000 losses into account.

²³⁰ See Singer, *supra* note 209, at 621.

²³¹ See *id.*

which an entire geographic region had come to rely.²³² According to Singer, a property right arose in these workers as a result of this long-established relationship.²³³ This right created an entitlement. In bankruptcy terms, one could define this entitlement as a claim.²³⁴ Admittedly, this is not the type of claim that bankruptcy law currently recognizes, but that is not to say that such a right could not be recognized, given the proper limitations.

Although Singer acknowledges that past work does not currently create a property right, he argues that a joint enterprise is created through the owner's assets and the workers' labor, which could justify protection of the nonowner party to the enterprise.²³⁵ Recognizing the vulnerability of both workers and other members of the communities in which they work, Singer argues that companies must be required to balance and consider competing types of interests when making corporate decisions that affect these interests.²³⁶ He argues that we must be able to encourage desirable economic change without leaving a wasteland of social misery in its wake.²³⁷

²³² See *id.* at 618–23. As Singer recounts: “Everything that has happened in the Mahoning Valley has been happening for many years because of steel. . . . And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel.” *Id.* at 618 (quoting Local 1330, United Steel Wkrs. v. U.S. Steel, 631 F.2d 1264, 1279 (6th Cir. 1980)).

²³³ See *id.* at 657.

²³⁴ Section 101(10)(C) of the Code recognizes that a creditor can possess a community claim; a “claim” is defined as a present right to be paid. See 11 U.S.C. § 101(5) (1994) (defining a “creditor” as a person holding a claim arising under various Bankruptcy Code provisions or a person holding a “community claim”); 11 U.S.C. § 101(10)(C) (1994) (defining a “claim” as a right of payment or equitable remedy based on state law). Under existing law, current workers have no right to be employed in the future unless a contract provides otherwise. See Singer, *supra* note 209, at 657.

²³⁵ See Singer, *supra* note 209, at 657–59.

²³⁶ See *id.* at 661. This is in effect no different than other types of mutually dependent property relationships such as the landlord/tenant relationship. See *id.* at 679–84.

²³⁷ See *id.* at 719–20. Singer is not alone in his focus on the concerns of workers in the context of plant closings. Many studies have been done in order to measure the economic and other harms caused by plant closings. For the most part, these studies confirm that workers who are displaced from diminishing industries experience more loss of income than other displaced workers, and that they have more difficulty moving into other employment opportunities. See Mary Ellen Benedict & Peter Vander Hart, *Reemployment Differences Among Dislocated and Other Workers*, 56 AM. J. ECON. & SOCIOLOGY 1, 2 (1997) (finding that workers displaced from declining industries are often unable to move into stable or growth areas, and if they do, these jobs often do not compensate them as well, causing a loss of wages and human capital); Bruce C. Fallick, *A Review of the Recent Empirical Literature on Displaced Workers*, 50 INDUS. & LABOR REL. REV. 5, 5–6 (1996) (reviewing recent

The same argument can be made in the context of important bankruptcy decisions that affect enormous varieties of nonpecuniary interests.²³⁸ We must be able to deal with prevailing social problems within our legal system in order to avoid leaving a messy wake of greater societal waste in the name of maximizing values for creditors.²³⁹ Singer argues for an extension of existing property law, based on analogous principles in tort and contract law. These changes in the law, he argues, are justified by changing social values and changing social conditions.²⁴⁰

Similar changes are taking place in today's bankruptcy arena. Large Chapter 11 cases are more prevalent than they once were and a greater number of people are affected by them. Social welfare programs and other system-wide safety nets are also becoming less prevalent, which might justify developing other legal systems to compensate for these losses. Finally, wage earners are making less money than ever, are working harder, and are enjoying less job security than at any time in recent history. These changes may justify a change in the way in which we currently define property. On the other side of the balance sheet, they also may justify a change in the way we define and prioritize debt.

b. *Redefining Debt*

When we conceptualize debt, we necessarily think about hierarchies of debt: debt collateralized by security, debt entitled to priority, and garden-variety debt that enjoys no special status. Law and Economics scholars have succinctly explained these just deserts. Secured creditors are entitled to their superior position because they bargained for and received the collateral, just as all other creditors could have done.²⁴¹ Unsecured creditors, they claim, can simply

empirical studies of displaced workers, confirming that loss of wages from displacement is persistent over time, and that displacement is thought to disrupt lives, foul hard-earned expectations, waste human resources, and thrust the burden of economic adjustment on an unlucky few); Ann Huff Stevens, *Persistent Effects of Job Displacement: The Importance of Multiple Job Loss*, 15 J.L. & ECON. 165, 175 (1997) (finding that once displaced, workers have difficulty maintaining employment and have a permanent loss of income).

²³⁸ See Singer, *supra* note 209, at 699–701.

²³⁹ We already allow creditors' claims to be forsaken, to some extent, when we allow Chapter 11 debtors to use cash collateral against a creditor's wishes, or approve a priming lien. See 11 U.S.C. §§ 363–364 (1994).

²⁴⁰ See Singer, *supra* note 209, at 636–37.

²⁴¹ See Jackson & Kronman, *supra* note 183, at 1147–48.

charge a higher interest rate for credit to compensate them for their lack of collateral.²⁴²

Although this theory has been criticized on a number of fronts, it was turned on its head in Professor Lynn LoPucki's article, *The Unsecured Creditor's Bargain*.²⁴³ In this landmark article, LoPucki first argues that few unsecured creditors actually choose their lot in the debtor's debt scheme.²⁴⁴ This is not hard to believe. It seems likely that anyone who *could* get collateral, *would* get collateral.²⁴⁵ In fact, many creditors—including utilities, taxing authorities, tort claimants, and environmental claimants²⁴⁶—have no intention of lending money to the debtor. Because Law and Economics relies so heavily on assumed consent to explain entitlement, when this consent is absent, secured credit no longer sounds so fair.

²⁴² See *id.*

²⁴³ LoPucki, *supra* note 183 (challenging the prominent notion that secured credit is economically efficient). For a detailed and thought-provoking critique of LoPucki's analysis, see Susan Block-Lieb, *The Unsecured Creditor's Bargain: A Reply*, 80 VA. L. REV. 1989 (1994).

²⁴⁴ See LoPucki, *supra* note 183, at 1896. As LoPucki explains, a great deal of unsecured debt is involuntary, as is the case with tort claims, claims for utilities, and claims for taxes. See *id.* None of these creditors chose to extend credit; rather, they came upon their creditor status by chance. See *id.*; see also TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 18, 29 (1989) (referring to the same concept but calling such creditors "reluctant creditors").

²⁴⁵ See LoPucki, *supra* note 183, at 1895. Those wishing to explain why someone would forego collateral claim that transaction costs are higher for secured debt, that unsecured debt bonds management to the interests of equity holders, and that unsecured creditors are less vulnerable to loss than their competition and thus lack the incentive to outbid them for secured credit. See *id.* As LoPucki establishes, however, none of these explanations make much sense, and even if they did, they would be inapplicable in the context of unsecured credit. See *id.* at 1895-96.

²⁴⁶ Although these obligations can surely be categorized as voluntary short-term loans, LoPucki calls them "involuntary" or "reluctant" creditors because they are not in the business of extending credit and did not seek a credit relationship. See *id.* at 1896. Another way to explain this terminology would be to view the extension of credit as a result of a utility's billing system, not as a choice to become a creditor. "Involuntary" may not describe the status of these creditors as accurately as "creditor without a written agreement regarding repayment." *Id.* Whatever we call this form of debt, LoPucki's conclusion is accurate; there is plenty of this kind of debt in the system. See *id.* at 1896-97. Moreover, by taking on large amounts of secured debt, debtors can virtually insulate themselves from these kinds of debt, for which no recovery will be available. See *id.* at 1938; see also GROSS, *supra* note 2, at 13 (discussing involuntary creditors).

Based upon this lack of consent and the fact that paying tort claims is necessary to ensure that tortfeasors do not externalize costs attributable to their operations, Professor LoPucki concludes that involuntary unsecured debt arising from tort claims should be higher in priority than secured debt.²⁴⁷ After all, secured creditors chose to deal with the debtor and should thus bear more responsibility for the risk of nonpayment.²⁴⁸ If tort claimants had priority over secured creditors, secured creditors could choose not to lend to the borrower based on the known risk of nonpayment.²⁴⁹ This is not true when secured creditors have priority, however, because the involuntary creditor makes no choice to extend credit and thus cannot decline to do so.²⁵⁰ Thus, the risk of loss to the economy is greater when the secured creditor has a higher priority than does the unsecured creditor.²⁵¹

LoPucki also suggests that voluntary unsecured debt should take priority over secured debt because a system that favors secured debt creates far more secured debt than can actually be paid.²⁵² Unsecured creditors, many of whom are unsophisticated, end up lending to the debtor regardless of the debtor's debt situation.²⁵³

²⁴⁷ See LoPucki, *supra* note 183, at 1947. LoPucki reaches this conclusion by finding flaws in three common justifications for enforcing security interests: (1) everyone has access to information about the law; (2) a grant of security is tantamount to a conveyance of property; and (3) secured and unsecured creditors compete in the same market for extensions of credit. *See id.* at 1949-58.

²⁴⁸ *See id.* at 1907.

²⁴⁹ *See id.* at 1909. A similar idea was discussed in a thoughtful student note discussing the lack of incentive companies have to avoid asbestos liability when the resulting claims are general unsecured claims. *See* Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1059-68 (1984).

²⁵⁰ *See id.*; *see also* Kathryn R. Heidt, *Cleaning up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste Bankruptcies*, 40 RUTGERS L. REV. 819, 830-51 (1988) (noting that environmental creditors might be entitled to priority ahead of or payment from secured creditors, because secured creditors could tailor their actions to respond to such a law, while the environmental creditor can do nothing to eliminate the risk of loss). This suggestion is sensible given the enormous importance of a clean environment to the public.

²⁵¹ *See* LoPucki, *supra* note 183, at 1909.

²⁵² *See id.* at 1932.

²⁵³ *See id.* at 1931. LoPucki also argues that many unsecured creditors already obtain priority over secured creditors, by extending credit on a short term basis from cash flow. These creditors are fine as long as the business survives. Otherwise, they cut their losses and give up. *See id.*

LoPucki's analysis, based primarily upon the real, rather than implied, bargains that creditors make or fail to make, is instructive in considering noncreditors'²⁵⁴ status in bankruptcy proceedings. Like the involuntary creditor, many of these parties made no bargain with the debtor.²⁵⁵ The neighbors of Krupa's did not choose to live near a failing business enterprise that later became the subject of a "strip joint's" bid. And though both the healthcare recipients and the employees did choose to do business with the debtor, they probably had very little real bargaining power. Unlike Article 9 in the context of secured credit,²⁵⁶ there are no information systems to assist an employee or the recipient of healthcare benefits in assessing such a company's financial condition or deciding what form of bargain to make. In essence, there is no real bargain.

LoPucki argues that some creditors with unsecured claims are entitled to priority over some creditors with secured claims, because the assumptions we make about secured credit are false.²⁵⁷ Although his suggestions are radical in and of themselves, he is suggesting a restructuring of priorities among *existing* claims.²⁵⁸ Creating property rights in those who do not possess "claims"²⁵⁹ under existing bankruptcy law is a still larger step. I am not suggesting that compensating people for nonpecuniary rights in bankruptcy is the next logical step arising from Professor LoPucki's analysis. Instead, I argue that, just as we can extend or reverse our historically-conceived priority system, we can extend our historically-conceived view of what constitutes a "claim." We can redefine "claim" through future expectations, such as an expectation of future employment or an expectation that toxic waste dumps not be abandoned.

I am certainly not, through this analysis, suggesting that noncreditor interests obtain priority over secured creditor interests. I am merely suggesting

²⁵⁴ In this context, "noncreditor" means a creditor holding a nonpecuniary claim, such as those described in this Article, that does not rise to the level of a cognizable bankruptcy "claim" under the Bankruptcy Code. See 11 U.S.C. § 101(5) (1994) (defining a "claim" as a "present right to payment").

²⁵⁵ This idea, that unsecured creditors made no real bargain with the debtor, may seem somewhat inconsistent with the notion that workers might have a property right in an enterprise in which they work. Singer's proposals, however, are based on property rights arising out of service and not through contractual relations. See Singer, *supra* note 209, at 621-23.

²⁵⁶ See Uniform Commercial Code §§ 9-102 to 9-507 (West 1997) (providing a uniform notice system for which of a debtor's assets is encumbered by security interests).

²⁵⁷ See LoPucki, *supra* note 183, at 1947-63.

²⁵⁸ See *id.* at 1963-64.

²⁵⁹ See 11 U.S.C. § 101(5) (1994).

that the bankruptcy concept of "claim" is malleable. The fact that we do not compensate for these interests now does not mean they should never be subject to compensation. The two primary arguments supporting LoPucki's argument subordinating secured creditor claims also support some compensation to or weighing of these interests, first because the holders of these interests made no bargain, and second because we should do what we can to prevent businesses from externalizing costs attributable to their operation, including the cost of labor.

Professor Kathryn Heidt has suggested an expansion of the definition of "claim" in her analysis of environmental obligations. Noting that it is often unclear whether some obligations, such as clean-up orders, qualify as claims at all,²⁶⁰ Heidt argues that we should redefine our concept of "claim" to ensure that public health and welfare is preserved.²⁶¹ This is one example of an area, she argues, in which long-term societal goals must take precedence over short-term economic goals.²⁶²

Concluding that any entity that continues to pollute must not receive a bankruptcy discharge of its obligations to clean up,²⁶³ Heidt argues that internalization of environmental costs would be maximized if recovery were allowed in bankruptcy cases not just for actual injury but also for increased risk

²⁶⁰ See Heidt, *supra* note 25, at 1071-75.

²⁶¹ See *id.* at 1075 (noting that due to the confusion between what constitutes a claim and, thus, what obligations can be treated in a reorganization plan and then discharged—as opposed to paid in full postbankruptcy—litigants like the EPA often settle a big case rather than risk loss). This phenomenon could cause severe harm to the public if the settlement is not as favorable as a court's ruling would be. See *id.* The public is harmed by environmental damage that is not remediated and by additional taxes that may be needed to clean up sites that the users fail to fully remediate. See *id.*

²⁶² At first glance, many people thought that predictors of environmental disaster were over-reactive and out of touch with reality. Sadly, the opposite has proven true. We have done far more permanent damage to the environment than anyone ever predicted. See, e.g., MICHAEL B. GERRARD, *WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING* 11-12 (1994) (discussing the travesties of the Love Canal and abandoned pesticide plants in Arkansas which contain DDT, Agent Orange, and dioxin-contaminated waste); L.R. JONES & JOHN H. BALDWIN, *CORPORATE ENVIRONMENTAL POLICY AND GOVERNMENT REGULATION* 141-42 (1994) (stating that toxic chemicals are found in the bodies of most if not all Americans, including chemicals that cause cancer, birth defects, and other health problems, and that there has been a 12,500% increase in the production of chemicals from 1940-1987); Denis Smith, *The Frankenstein Syndrome: Corporate Responsibility and the Environment*, in *BUSINESS AND THE ENVIRONMENT: THE IMPLICATIONS OF THE NEW ENVIRONMENTALISM* 172 (Denis Smith ed. 1993) (discussing who ultimately paid the price for Seveso, B'hopal, and Exxon Valdez).

²⁶³ See Heidt, *supra* note 25, at 1078.

of injury due to environmental harm.²⁶⁴ Victims could be compensated for this increased risk without proving that they had a current right to be paid. Funds to pay for such risks could be contributed to a fund, on an ongoing basis, so that money would be available to compensate whatever harms arise.²⁶⁵

Heidt also suggests that we expand the definition of claim to include all equitable and legal obligations, not just those that are due in present dollars.²⁶⁶ Currently, an obligation that is purely equitable is one for which money cannot presently be substituted.²⁶⁷ This necessarily pushes the obligation outside the definition of "claim." For example, in some states, rights to specific performance cannot be reduced to a claim.²⁶⁸ Yet these entitlements may be worthy of treatment in a case, regardless of whether they fit within our current definition of claim. As Professor Heidt has suggested:

The very concept of debt or obligation in bankruptcy can be expanded or contracted to bring in or leave out different obligations. We could even expand the concept so far as to include the interests of employees or the local community or others who do not currently have an official voice in bankruptcy.²⁶⁹

²⁶⁴ See *id.* at 1080. Other suggestions for internalizing these costs include charging shareholders for clean-up costs and giving environmental creditors secured status both inside and outside of bankruptcy, see *id.* at 1079-86, the latter idea to give analogous taxes higher priority than voluntary secured debt. The incentive to internalize seems to work. Banks regularly monitor a debtor's tax payments to avoid losing priority to tax liens.

²⁶⁵ See *id.* at 1081.

²⁶⁶ See *id.* at 1082-83.

²⁶⁷ See *id.*

²⁶⁸ See *id.* at 1083. Unlike persons with a nonpecuniary interest as discussed in this Article, persons with a right to specific performance receive full performance rather than nothing at all. This is why Professor Heidt claims that retaining this distinction causes inequality among similarly situated stakeholders. Full performance occurs because equitable rights are legally cognizable rights, whereas many of the rights I have been discussing are not. The specific performance example does, however, demonstrate the considerable flexibility we have in defining a claim.

²⁶⁹ *Id.* at 1055. Professor Heidt may not approve of this particular use of her quote. In the same article, she specifically states that the "lost jobs" arguments have few who recommend them and that such arguments may be short-sighted. See *id.* at 1092. The extent to which this is true depends upon what is done about these lost jobs. Even I am not suggesting that these concerns take precedence over all other issues. I merely believe, as discussed *supra* in Part III.B.3.b, that employees should have a right to be heard on issues of future employment.

In other words, the concept of claim is flexible and subject to change. Expanding the notion of claim, in order to compensate nonpecuniary claims or balance these interests against current economic claims, is one way to address the rights of those with no current voice in bankruptcy proceedings.

2. *Estimation for Speaking Purposes Only:* *A Voice Without Payment*

If the task of quantifying and then compensating nonpecuniary rights by redefining property rights or claims is too drastic, less drastic solutions also are available. Undoubtedly, some nonpecuniary interests are actually more valuable to society than economic ones. Environmental issues and other matters involving public safety provide examples.²⁷⁰ The bankruptcy system addresses issues like these primarily through its priority system.²⁷¹ Some interests, however, fall through the cracks.²⁷²

One could imagine a system in which nonpecuniary interests could be translated into dollar values for the purposes of determining which interests were greater. A similar approach is used in estimating claims for the purposes of Chapter 11 plan voting.²⁷³ Claims that are contingent or unliquidated are often estimated for the purpose of either ultimate allowance and payment, or for the purpose of voting on confirmation of a Chapter 11 plan.²⁷⁴ Estimation procedures were included in the Code in order to fix the debtor's liability for contingent or unliquidated claims and, thus, to ensure that all legal obligations of the debtor would be converted into dollar amounts.²⁷⁵ The particular estimation method is left almost entirely up to the judge,²⁷⁶ and can employ

²⁷⁰ See 11 U.S.C. § 362(b)(4)-(5) (1994) (excepting actions involving the enforcement of the government's police power from the automatic stay); Heidt, *supra* note 250, at 832-35 (arguing that it is necessary for economic and societal reasons, that environment claims receive priority).

²⁷¹ See 11 U.S.C. §§ 503, 507 (1994).

²⁷² See *supra* notes 146-82 and accompanying text.

²⁷³ See 11 U.S.C. § 502 (c) (1994).

²⁷⁴ See David R. Weinstein et al., *Estimation of Claims: Precedential Effects of Court's Estimation*, 15 AM. BANKR. INST. J. 12, 12-13 (1996).

²⁷⁵ See *In re Evans Products, Co.*, 60 B.R. 863, 866 (Bankr. S.D. Fla. 1986) (discussing the legislative history of 11 U.S.C. § 502 (c) (1994)).

²⁷⁶ See David Kauffman, Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 168-73 (1982); Neil Wyland, *Toward Protection of Creditors and Estimated Claims in Cram Down: How Indubitable Should the Equivalence Be*, 42 UCLA L. REV. 1389, 1416-17 (1995).

statistical evidence, studies from other disciplines, or a host of other flexible means.²⁷⁷ In that sense, claim estimation is an ideal model upon which to base some method of converting interests that are not currently measured in dollars into dollar values.²⁷⁸ Estimations of nonpecuniary claims could even be used for plan voting purposes only, meaning that the holders of these nonpecuniary claims could receive a voice in the estimated amount, but would not necessarily be compensated or credited based upon the estimated amount.²⁷⁹

There admittedly is a conceptual difference between estimating an economic claim that has not yet been quantified and estimating a nonpecuniary claim. How would one value the potential deterioration of a neighborhood in dollars? How would one estimate the value of future employment, which is by no means certain, over a period of years? The estimation of future tort claims may provide guidance for estimating claims that are economic but not presently due,²⁸⁰ but as for claims that are not traditionally considered pecuniary, we are still attempting to compare apples and oranges on some levels.

Our current legal system provides few mechanisms for making such a calculation measurable or meaningful. Both Judge Schermer and Professor

²⁷⁷ See *In re A.H. Robins Co.*, 880 F.2d 709, 720 (4th Cir. 1989) (discussing the various § 502(c) estimation methodologies used in the *Johns-Manville* case).

²⁷⁸ While the notion of estimation is quite flexible, it is usually used to estimate unliquidated, unsecured claims like tort claims currently being litigated. See *In re A.H. Robins Co.*, 880 F.2d at 720. One scholar, however, has suggested that estimation procedures be used to determine the value of a secured creditor's collateral, to determine the indubitable equivalent in a cramdown context. See Neil P. Olack, *The Asset Payment Plan: Satisfying the Indubitable Equivalent Requirement*, 10 Miss. C.L. REV. 21, 37-38 (1989). But see Wyland, *supra* note 276, at 1420-21.

²⁷⁹ Under the current estimation statute, debtors must estimate claims whenever the full liquidation of the claim would unduly delay administration of the case. See 11 U.S.C. § 502 (c) (1994). The procedure is commonly used in mass tort cases to value claims that are far too numerous to value through a full-scale adversary proceeding. See *Kane v. Johns-Manville Corp. (In re Johns-Manville)*, 843 F.2d 636, 641 (2d Cir. 1988); see also *In re A.H. Robins Co.*, 880 F.2d at 720 (noting that the *Manville* court estimated the asbestos claim using statistical means, epidemiological studies, and data from claims previously filed against *Manville*); *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 262 (S.D. Ohio 1996) (finding future asbestos claims within Bankruptcy Code definition of "claims" and thus subject to estimation); *In re Joint Eastern & Southern Districts Asbestos Litig.*, 151 F.R.D. 540, 542 (E. & S.D.N.Y. 1993) (describing procedures for appointing "neutral independent experts" to estimate claims in *Johns-Manville* bankruptcy).

²⁸⁰ See, e.g., *In re Amatex Corp.*, 755 F.2d 1034, 1041 (3d Cir. 1985) (discussing estimation of future tort claims); *In re UNR*, 71 B.R. 467, 471 (Bankr. N.D. Ill. 1987) (reserving a determination of whether the holders of future asbestos claims are creditors under the Bankruptcy Code).

Gross have claimed that many of the noncreditor interests affected by bankruptcy cannot be quantified.²⁸¹ I am not convinced.²⁸² Consider the enormous number of nonpecuniary interests that juries quantify every day. One surely could use economists to measure the future employment rights and appraisers to measure deterioration of the neighborhood. Whether nonpecuniary claims are measured for distribution and balancing purposes, as was discussed in the prior subsection, or merely for the purpose of plan voting, some quantification may be required and would be difficult, but not impossible, to achieve.

The purpose of this estimation discussion is to begin a discourse about the ways such measurements could be made. To start the process of considering the proper treatment of these interests, the estimation process used to estimate claims in Chapter 11 may be a useful preliminary model.

²⁸¹ See GROSS, *supra* note 31, at 1039; Schermer, *supra* note 32, at 1049.

²⁸² As Professor Warren has noted:

[W]hile the broader effects of business failure can be elusive to measure, they are nonetheless very real. Congress—whether out of a crass concern about reelection or a superior view of the deeper social implications of business failure in a highly integrated society—accepted the idea that bankruptcy serves to protect interests that have no other protection. The older employee, the regular customer, the dependent supplier, and the local community are important; and bankruptcy attends to many of their concerns, regardless of whether they have rights recognized at state law.

Warren, *supra* note 27, at 788. On the issue of how to measure “social wealth,” which he defines as all things of value, not just tangible things, Professor D. Bruce Johnsen noted:

As we all know, my right to burn garbage in my backyard conflicts with my neighbor’s right to breathe smoke-free air. Consequently, the judiciary will eventually face the question of which mutually exclusive set of expectations over scarce goods maximizes social wealth. To answer this question the judiciary must, if only explicitly, measure social wealth in alternative states of the world. Our ability to measure wealth empirically in terms of dollars or dollar equivalents is limited and therefore provides us with limited solace; only rarely do cases lend themselves to such precise measurement. The best we can hope for is that some subset of the relevant values can be measured in dollars or dollar equivalents, thereby leaving a smaller and more manageable set of immeasurable values to the rumination of the presiding judge.

D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263, 284–85 (1986).

3. *Providing a Voice as a Goal in and of Itself*

Some would claim that even estimating these nonpecuniary rights may be too great a burden on the current bankruptcy system. Perhaps just hearing the concerns of parties without current claims could provide a benefit in and of itself. At the moment, we have no idea what the impact on such interests has been. As a scholar from the emerging Law and Narrative movement recently noted:

Since all decisionmakers are inevitably situated somewhere, decisions reached without attention to the experiences of those subjected to them will reflect the unacknowledged partiality of those reaching them. The choice is not between "fact" and "fiction," or between "objectivity" and "subjectivity." *Someone's* story will emerge in legal decisions; the only question is whose.²⁸³

Absent changes in our bankruptcy system, the unexpressed interests of parties holding nonpecuniary interests will never emerge or be heard.²⁸⁴ Recognizing that not all interests are expressed in our judicial system, authors in the Law and Narrative movement claim that the mere act of telling an otherwise untold story affects how law is made and applied.²⁸⁵ Although the

²⁸³ See Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79, 85 (1991) (reviewing NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke ed. 1991)) [hereinafter NARRATIVE AND LEGAL DISCOURSE]. There is, of course, no guarantee that merely allowing these interests to be expressed will actually further the interests of those expressing them. It may or may not. Without being expressed, however, we can be sure that no possible solution to this problem will be reached or even discussed.

²⁸⁴ See *supra* notes 71-98 and accompanying text.

²⁸⁵ See Baron, *supra* note 283, at 82-85. The notion is that the content of the story, and the act of telling it, will bring factors to bear that were hidden, and thus reconstruct or change results. As Professor Richard Delgado describes:

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone. Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414-15 (1989).

precise form of this effect is not always clear, this new legal discourse finds benefit in the fact that untold stories are ultimately told.²⁸⁶ Although it may seem odd to discuss such an esoteric and theoretical concept in bankruptcy scholarship, this emerging legal discipline provides insight into the implications of a narrow approach to standing.²⁸⁷ Even outside the Law and Narrative movement, scholars have long recognized that in a highly legalized society like ours, individual freedom and autonomy is often dependent upon access to the law, access which is often denied to certain persons or groups.²⁸⁸

Some stories are never permitted to be told because of inequalities in the legal system and society as a whole.²⁸⁹ Some interests are marginalized and

²⁸⁶ See E. Elizabeth Dallam, *The Growing Voice of Indigenous Peoples: Their Use of Storytelling and Rights Discourse to Transform Multilateral Development Bank Policies*, 8 ARIZ. J. INT'L & COMP. L. 117, 121-27 (1991) (discussing how narrative discourse by marginalized groups may be a "powerful tool for transforming legal thinking"); William M. O'Barr & John M. Conley, *Litigant Satisfaction Verses Legal Adequacy in Small Claims Court Narratives*, in NARRATIVE AND LEGAL DISCOURSE, *supra* note 283, at 65, 76-88 (describing the difference between the legal adequacy of the stories told and the actual impact of such stories, and finding great value in the stories, but refusing to conclude that they had an impact on the outcome of cases in small claims court). *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 824-27 (1993) (doubting that any real impact occurs as a result of storytelling).

²⁸⁷ This Article is not the first to use Law and Narrative concepts to support bankruptcy scholarship. In his symposium article defending Chapter 11 against its critics, Professor William C. Whitford used storytelling to explain the misconceptions of Chapter 11. See William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L.Q. 1379, 1385-92 (1994). Law and Narrative has also been used in the highly conservative and formalistic field of corporate law. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1992) (using Law and Narrative theory to explain how corporate law is applied); *see also* GROSS, *supra* note 2, at 131.

²⁸⁸ See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, *cited in* Rapoport, *supra* note 2, at 800 n.62.

²⁸⁹ The core of the Law and Narrative movement is the notion that stories told by oppressed persons or interests have special significance. Some even claim that the power of communicating these stories can transform the law by changing the consciousness of more influential members of society who will in turn change the letter of the law. See Delgado, *supra* note 285, at 2435-37 (discussing African American, Mexican American, and Native American traditions of storytelling). *But see* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1259 (1992) (questioning whether free expression will ever actually result in societal or legal changes).

silenced by systemic legal procedures and societal biases.²⁹⁰ Nonpecuniary interests have been marginalized and silenced in a similar, but more profound, way by current bankruptcy practices.²⁹¹ Like strict evidentiary rules that limit the extent with which certain interests are heard, limiting bankruptcy court standing silences these interests.²⁹² With limited bankruptcy court standing, however, the silence is complete. No story is told at all.

If, as narrative theory scholars claim, letting stories be told is beneficial, what can we accomplish through storytelling? Put another way, can storytelling be a solution to problems addressed in this Article, namely that the voices of nonpecuniary interests are not being heard in large Chapter 11 cases that are affecting society as a whole?

To ask storytelling to address all of the problems raised by this Article would be to ask too much. Law and Narrative theory does provide some assistance, however. A central tenet of Law and Narrative is that traditional legal jurisprudence, which is deeply rule-centered and positivistic, has failed to respond to the uniquely human element of society.²⁹³ Technical legal analysis is seen as too sterile and abstract to respond to human beings, without whom we would not need a legal system.²⁹⁴ Legal problems are essentially human problems, and lawyers, judges, and even people who run and advise large corporations must draw upon both human and legal skills to solve legal

²⁹⁰ See Dallam, *supra* note 286, at 131 (noting that the use of both narrative and rights discourse by historically marginalized groups function as a shared vocabulary and helps groups bind together and organize against oppressive laws); see also Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 865 (1993) (stating that narrative is "an excellent methodological tool and an antihegemonic analytical device"); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 355-56 (1994) (stating that narratives from traditionally marginalized cultures can make society more responsible to the needs of "a multicultural world").

²⁹¹ See *supra* notes 67-98 and accompanying text.

²⁹² The idea of sitting around and talking just for the sake of talking has not been exactly well-accepted in the bankruptcy context. Professor James Bowers has accused Professor Donald Korobkin as prescribing this method in bankruptcy proceedings and feels certain that creditors gain precious little from the approach. See Bowers, *supra* note 16, at 72-76. I agree with Korobkin and find "talking" beneficial for the reasons discussed in this subsection.

²⁹³ See Baron, *supra* note 283, at 93-94; Rapoport, *supra* note 2, at 798-801.

²⁹⁴ See Baron, *supra* note 283, at 94-97.

problems.²⁹⁵ Thus, a limited view of standing can produce the same result in another context: a bankruptcy system that is not responsive to the human beings for whom it was designed.

Even modern economists have acknowledged that ignoring the "human element" can have grave consequences.²⁹⁶ At the very least, then, if hearing these otherwise silenced voices will facilitate consideration of the human side of legal issues, there ought to be a resulting benefit to the human condition.

Allowing noneconomic interests to be expressed will also educate us about these interests.²⁹⁷ At the very least, we can determine what interests are being affected and how, and, if appropriate, determine what can and should be done to further these interests. Knowledge of the condition of these interests is itself very valuable in determining future bankruptcy policy. In fact, until we know exactly how these outside interests are being affected, it may be dangerous to ignore them.

4. *Considering Noneconomic Interests as Junior Interests*

Assuming that just listening to noneconomic interests is not enough, and that paying a distribution²⁹⁸ for or providing economic credit for such claims may be more than the system can accomplish at this time, what other consideration could these interests receive? While Joseph Singer urges a shift in the property paradigm,²⁹⁹ he also espouses a far less radical principle based on

²⁹⁵ See *id.*; see also GROSS, *supra* note 2, at 102; see generally Rapoport, *supra* note 2 (discussing the unique role attorneys can play in assisting clients to attend to the human element of law).

²⁹⁶ WOLMAN & COLAMOSCA, *supra* note 60, at 66. Michael Hammer's and James Champy's book, REENGINEERING THE CORPORATION (1994), has been used as a "handbook" for downsizing companies. The book proposed massive, quick layoffs of huge numbers of workers. See HAMMER & CHAMPY, *supra*, cited in WOLMAN & COLAMOSCA, *supra* note 60, at 66. After thousands of workers were laid off from numerous companies, based on the advice in the book, Hammer acknowledged that he erred in not considering the human side of the issue. See *id.* at 68. He stated that the idea is no longer "so much getting rid of people. It's now getting more out of people. I wasn't smart enough about that. I was reflecting my engineering background and was insufficiently appreciative of the human dimension. I've since learned that's critical." *Id.*

²⁹⁷ We are painfully uninformed about how large bankruptcy cases have impacted the rights of noncreditor interest. Having provided no place at which such information can be gleaned, we are in no position to draw conclusions about the potential effects or lack thereof.

²⁹⁸ See *supra* note 224.

²⁹⁹ Singer, however, bases his reliance interest on current property doctrines:

the golden rule.³⁰⁰ Specifically, Singer suggests that one should not be permitted to leave a community in waste if there is another viable option.³⁰¹ This principle translates into a very simple, logical, and persuasive method of considering nonpecuniary rights in bankruptcy. One might simply consider these interests to be junior to existing economic interests, but still important. It may be possible to address these nonpecuniary interests without negatively affecting current economic claims in the case. In essence, the court would consider the apples first, and then consider the oranges.³⁰²

This approach would be better than simply allowing nonpecuniary interests to be heard. It also would provide further support for the idea that these interests should be expressed and explored. It would be improper to inadvertently and unnecessarily hurt these interests, simply because we do not know what they are.

Admittedly, this approach is unlikely to be entirely effective in protecting noneconomic interests. Because economic interests would be paramount, it

They include, for example, the rules about adverse possession, prescriptive easements, public rights of access to private property, tenants' rights, equitable division of property on divorce, [and] welfare rights. . . . The legal system requires this shift, not because of reliance on specific promises, but because the parties have relied on each other generally and on the continuation of their relationship. Moreover, the more vulnerable party may need access to resources controlled by the more powerful party, and the relationship is such that we consider it fair to place this burden on the more powerful party by redistributing entitlements.

Singer, *supra* note 209, at 622–23. Singer suggests a reliance interest in property as a counterbalance to the notion of free alienability. While tort concepts like strict liability and contract concepts like good faith and unconscionability help maintain a balance between individual and public interests, property law has been very underprotective of community interest. *See id.* at 636.

³⁰⁰ As Singer states:

“We must combine our concern for associational freedom with our concern for preventing abuses of power by the haves against the have-nots. We can approach this dual goal by asking: What preconditions are necessary for healthy social relationships to develop? Those preconditions are defined by the ends society should have; they embody the form of social life we hope to create.”

Id. at 751.

³⁰¹ *See id.* at 719–20.

³⁰² A similar construct already is used in bankruptcy cases, when considering the rights of equity holders to receive a distribution from the estate. *See Lopucki & Whitford, supra* note 66, at 680–83.

would be easy to find an existing economic interest that could be affected to some small degree by a concession to nonpecuniary interests. This could lead to mere lip service to nonpecuniary interests, without real consideration of them.

On the other hand, this approach is preferable to failing to hear and consider nonpecuniary interests at all. Judges who already consider nonpecuniary interests probably already use this golden rule approach.³⁰³ Moreover, if listening to these nonpecuniary interests was more common, more judges would consciously protect nonpecuniary interests at least to this extent. It is hard to imagine any argument against providing at least this much protection to societal interests. While some might argue that hearing these extra voices will take up valuable court time—thus creating inefficiency—as long as efficiency is measured accurately, hearing these additional voices will create, rather than impair, efficiency.

D. *Achieving True Efficiency*

In some ways, Law and Economics has given efficiency a bad name. Cruel and devoid of humanity, many Law and Economics models just do not measure the right things. Economics itself, however, is a different story. Economics recognizes happiness as a benefit and sorrow as a cost.³⁰⁴ In that sense, the

³⁰³ See *In re Financial News Network, Inc.*, 980 F.2d 165, 169–70 (2d Cir. 1992) (recognizing that sometimes the highest offer for assets is not the best, making it possible to take considerations other than price into account when approving a sale of assets); *In re After Six, Inc.*, 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993) (same).

³⁰⁴ See Bowers, *supra* note 16, at 71. Professor Bowers claims that:

Economics is concerned with human behavior in the production and allocation of what economists call “goods.” Goods are not limited to corporeal movables, which is how lawyers employ that term. Economists use “goods” in its broadest, most literal sense to mean any state of affairs that people think is good: that they actually value to the extent that [people] will expend some other resource to obtain it. Nothing inherent in economic analysis forecloses consideration of (or even necessarily slights) moral, aesthetic, romantic, or even spiritual values. In that sense, there are few, if any, noneconomic values. There are only values that really motivate people and those that do not.

Id.; see also Johnsen, *supra* note 282, at 268–69 (noting that an “economic good is . . . anything of which more is preferred to less” and that “all valued things are scarce”) (citations omitted). Naturally enough, when the residents of San Gobin begin living on the streets of Philadelphia, without their life support to boot, their demise will be a *cost*. Only the truly cold-hearted would see this as a benefit, because the residents would not need support—financial or otherwise—after death. For an interesting discussion on how one goes about

very idea of recognizing "noneconomic" interests in bankruptcy is misplaced.³⁰⁵ All interests are economic in the sense that if they are not dealt with properly, unfavorable economic conditions ultimately will result. The residents of a structured continuing care facility will become wards of the state, children in a deteriorating neighborhood will tax the criminal justice system, and displaced workers will collect unemployment and social security. Family and social support systems will break down, all at a great cost. These are real costs that can be measured in real dollars.

Economics itself, unlike Law and Economics, also recognizes that economic efficiency can only be accurately measured over time. Short-term profits are not economically significant.³⁰⁶ And, as noted in Part II.C of this Article, some economic and human conditions are not sustainable.³⁰⁷ These conditions, no matter how profitable in the immediate future, must be avoided.³⁰⁸ This is not sociology, but economics.

If we care about economic efficiency because it somehow pertains to the human condition, we cannot possibly measure it based on short-term corporate profits alone. As the sole measurement, this indicator will consistently require that corporations lay off as many workers as possible, pay few benefits, pollute the earth to the extent legally permitted, engage in no corporate giving, and sell

valuing human life, see STEPHEN E. RHOADS, *VALUING LIFE: PUBLIC POLICY DILEMMAS* (1980).

³⁰⁵ Bowers, *supra* note 16, at 72.

³⁰⁶ Large scale efficiencies, such as those reflected in high overall corporate profits, are too decentralized and too abstract to be of any benefit to most people. See SCHUMACHER, *supra* note 183, at 59-70.

³⁰⁷ See KONRAD GINTHER ET AL., *SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE* 365 (1995) (arguing that sustainable development is incompatible with unlimited economic growth).

³⁰⁸ See SCHUMACHER, *supra* note 183, at 59; see also KORTEN, *supra* note 202, at 207-26 (describing how corporate cannibalism and mass layoffs make money but threaten to make human beings obsolete). On the other hand, good health and job satisfaction cost less than their alternatives. See *id.* While Schumacher was certainly an unconventional economist in proposing that the human condition is relevant in determining what is important as an economist, he is not alone. For examples of other economists holding similar views, see H. DALY & J. COBB, *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1989); E. MISHAN, *INTRODUCTION TO NORMATIVE ECONOMICS* (1981); *ECONOMICS, ECOLOGY, ETHICS: ESSAYS TOWARD A STEADY STATE ECONOMY* (H. Daly ed. 1980). One primary way to improve sustainability is to rely more heavily on labor than tangible goods, as labor is unquestionably a sustainable resource. See KORTEN, *supra* note 202, at 240-41 (noting that corporations are investing in more and more machines, at the complete expense of human capital).

off existing assets for short-term profits.³⁰⁹ Corporate raiders who espouse this “pure” economic philosophy have been literally “feeding off” of socially responsible companies, arguing that taking them over is beneficial to America because the lower short-term profits, resulting from their decent business behavior, prove that they are inefficient.³¹⁰ Even top managers in this corporate takeover environment know their jobs are not safe, because they are only too familiar with this philosophy.³¹¹ Taken to its logical conclusion—and not even so outlandishly different from current reality—this form of economic efficiency could eliminate all access to a decent livelihood:

Perhaps one day, if allowed sufficient freedom to follow its own unrestrained tendencies, a global corporation will achieve the ultimate in productive efficiency, an entity made up solely of computers and machines busily engaged in the replication of money. We might call it the perfectly efficient corporation. Although this is surely not what anyone intends, we are acting as though this is the world we seek to create.³¹²

If creating piles of green bills, or electronic equivalents, is the goal in measuring economic efficiency, then short-term corporate profit maximization is the sole indicator. If we are concerned about people, on the other hand, we need to use a different measure of efficiency.

If we are concerned about people, efficiency should be measured not by solely counting dollars present today, but by deciding what is important to people and valuing the presence or absence of those things.³¹³ Dollars might be included in the category of important things, but, as we have just seen, by themselves they do not create value.³¹⁴ When Professor Bruce Johnsen proclaims that “wealth is value,” he is not talking about monetary wealth alone, but rather about all things, including intangible things, that we prefer over

³⁰⁹ See KORTEN, *supra* note 202, at 214–40.

³¹⁰ See *id.* at 207–13.

³¹¹ See *id.* at 244. *Business Week* calls the 1990s the age of the “dumpies,” the downwardly mobile professionals. *Downwards Mobility*, BUS. WK., Mar. 23, 1992, at 57–58.

³¹² KORTEN, *supra* note 202, at 241–42.

³¹³ See Johnsen, *supra* note 282, at 268–69; see also GROSS, *supra* note 2, at 208–09 (discussing study finding that small farm communities had a higher quality of life than agribusiness towns and that, as a result, the small communities were more efficient on one level).

³¹⁴ See Johnsen, *supra* note 282, at 268.

others.³¹⁵ Among the beneficial things recognized as valuable to economists are life, meaningful employment, health, clean air, safe schools, self-improvement,³¹⁶ and virtually anything else that motivates people.³¹⁷ One need only consider the cost a childless couple will endure in order to have or acquire a child, and one sees the dollar's failure to equate with all that is valuable. Can these noneconomic things be measured? Of course they can, and if they are to have any meaning in the bankruptcy context, they must.³¹⁸

There also is a difference between the goals of maximizing values to creditors and minimizing losses to the various parts of society. Many Law and Economics scholars insist that the sole purpose of Chapter 11 is to maximize values to creditors.³¹⁹ Other scholars believe the purpose is to minimize loss resulting from business failure.³²⁰ The difference between the two, in terms of

³¹⁵ See *id.*

³¹⁶ See Hal Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & Soc'y 50, 62-64 (1995). Professor Cooter attempts to explain benevolent behavior in economic terms. See *id.* This behavior is often explained as a result of the fact that human beings are complex organisms with many facets and that competitive behavior is but one form of human response. Professor Gross, for example, believes that human beings are basically good. See GROSS, *supra* note 2, at 6-7. I would like to agree but do not want to premise my entire argument on this assumption because I am not completely sure. I am hopeful but not always optimistic. Ultimately, this does not affect my analysis because I think that benevolent behavior is often efficient. See GROSS, *supra* note 2, at 102 (explaining that humanitarian grounds may translate into economic benefit). See KORTEN, *supra* note 202, at 241-42.

Moreover, people do things for more than one reason. After my friend Peter and I had lunch in a cafeteria-style restaurant, he suggested we clean up our trash even though it was not required. I agree but for a different reason. He altruistically wanted to save the employees a trip. I thought it would be more efficient for me to bring down the tray, rather than make someone make two trips, one toward the tray and the other away. The point is that one could engage in the same behavior for both reasons.

³¹⁷ See Bowers, *supra* note 16, at 72.

³¹⁸ Many scholars might disagree and say that we can use a strictly moral or normative approach in making bankruptcy decisions, without regard to cost-benefit analysis. Franz Schumacher certainly thought that forcing noneconomic values into a cost-benefit analysis reduced these important things to a lowest common denominator. See SCHUMACHER, *supra* note 183, at 41-42. I am not so sure. I understand that measuring certain things seems unsavory, but I see no alternative. Dollars are the accepted measure of the bankruptcy forum and attempting to introduce a new measurement is likely to slow down the acceptance of new types of interests into the process. To my mind, a cost-benefit approach is better than no approach at all.

³¹⁹ See *supra* note 1.

³²⁰ See Warren, *supra* note 27, at 788; Bowers, *supra* note 27, at 2143; Heidt, *supra* note 25, at 1078.

bankruptcy policy, is monumental, despite the fact that economically one would think the two would be equal. They are not the same because the benefits and losses are not always experienced by the same persons. The potential benefits are available to creditors only, while the losses are experienced over an enormous spectrum of society.

I see no reason to choose, as both are economically significant. Paying full attention to one of these goals while ignoring the other cannot be efficient. Both must be considered if efficiency is a goal. Otherwise, we simply redistribute losses without admitting that we are doing so. If we take the high bid over the lower one in the Fancy Pants example, we redistribute the losses to the workers. Similarly, we automatically distribute losses on the San Gobin residents if we do not consider their interests. Moreover, unless we measure and balance their losses when considering the overall economics of the situation, our decisions in bankruptcy cases may not be economically efficient. Thus, in my view, both long-term overall losses, as well as returns to creditors, must be considered in determining what is economically efficient.

Having said that, efficiency in the bankruptcy process itself is still necessary. Hearing all these additional parties will add administrative costs to cases and thus make reorganization more difficult and expensive.³²¹ In order to provide the maximum benefit to parties with no present economic interest to assert, there must be some limit on the extent to which noneconomic interests may be heard. Otherwise, nothing will ever be accomplished.

To address this concern, I propose two limitations on the situations in which the nontraditional claims discussed in this Article should be heard. First, based upon the standard used in other federal courts to establish standing, an interest must be substantial in order to be heard, but it need not be pecuniary.³²² If this standard works in other federal courts, it can work in the bankruptcy context as well.³²³ Second, nonpecuniary interests initially should be heard only in major events in a case, in which their substantial interests are affected. Initially, I propose that such interests be permitted expression in three

³²¹ See Bowers, *supra* note 16, at 73-74 (stating that talk is not necessarily cheap and someone must pay for it). While Professor Bowers argues that talk itself is a worthless remedy because it does not in itself create any real benefits, we do not know if this is the case because we have not heard what these voices have to say. See *id.*

³²² See *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). Under this test, a litigant must have "a personal stake in the alleged dispute," and suffer a potential injury particularized as to him. See *id.* The stake need not be pecuniary.

³²³ Under this approach, no particular groups—with exception of labor which should be treated differently—gets automatic standing. Rather, standing should be decided on a case-by-case basis, based upon the substantiality of interest test.

contexts only: plan confirmation, the sale of all or substantially all of a debtor's assets, and the rejection of an executory contract or unexpired lease.³²⁴ These pivotal events change the entire course of a case, particularly in the context of plan confirmation or an asset sale.

With these limitations, adding more parties to the bankruptcy bargaining table should not cause a significant increase in the cost of rehabilitation. Substantial nonpecuniary interests could only be heard on pivotal issues in a case, thus preserving the lion's share of the proceeding for traditional bankruptcy parties.³²⁵

Whatever costs result from this limited right, granted in limited contexts, are certainly justified by the benefits created. This is particularly true given that we may have no right to ignore certain of these interests, regardless of costs. Limiting bankruptcy court standing to pecuniary rights does not appear to be justified by prudential or other concerns. As a result, it would be better to adopt a limited expansion of standing now, in order to preclude the involuntary imposition of a broader standard later. In summary, hearing nonpecuniary interests in bankruptcy does cost money. These costs are unavoidable, however. We can pay now through responsive legal and social systems or pay later through unresponsive ones that create other forms of economic and social waste.

IV. CONCLUSION

We are living in credit-filled times, in which bankruptcy is not uncommon.³²⁶ More generally, these are times of massive economic restructuring and substantial financial loss. We have always known that losses like these are experienced broadly, by many segments of society. As more restructuring occurs, however, substantial losses become more common, particularly in geographic areas that lose entire industries to financial failure.

One of the purposes of bankruptcy law is to minimize, to the extent possible, the effects of these losses. How this is best accomplished varies depending on the type of loss experienced. Traditionally, bankruptcy proceedings have adjudicated the rights of the debtor vis-à-vis creditors, but not

³²⁴ The right to appeal an unfavorable decision also must be provided. *See* FED. R. BANKR. P. 2018 (failing to provide such an appeal to labor objecting to a Chapter 11 plan).

³²⁵ For added flexibility, the court could grant this right to be heard in other contexts for "cause." Perhaps this could be added to the Bankruptcy Code after we see how this proposed solution works.

³²⁶ *See* GROSS, *supra* note 2, at 6.

many other parts of society. This approach may no longer be acceptable, given the number of persons affected by bankruptcy cases.

One of the most difficult questions is how best to determine what interests to hear. We cannot open a Pandora's Box and hear the positions of all persons affected by a case, regardless of how tangential. Nor can we entirely ignore these interests, some of which are truly substantial. Many courts have in the past provided bankruptcy court standing only to persons with current pecuniary interests in the debtor. Statutory law does not impose this limitation, however, and there is no other justification for it. Both courts and Chapter 11 debtors themselves have an obligation to consider the rights of affected third parties when making important decisions. The only question is which interests to consider.

The task is to apply a rule of standing that allows parties to articulate substantial interests in bankruptcy cases, even if those interests are not pecuniary, but that also limits the contexts in which these interests can be asserted. This is not an impossible task. The standing standard utilized in other federal courts is applicable in bankruptcy cases and requires a substantial interest of any kind, not merely a financial kind. Some particular nonpecuniary interests should be provided a statutory right to be heard, such as those held by employees who are facing job losses. Rather than articulating any other particular type of interest that should be heard as a matter of right, we should limit the contexts in which these other substantial but noneconomic interests may be heard. Such interests should be heard only in major case events, such as plan confirmation, the sale of all or substantially all of the debtor's assets, or the rejection of an executor contract or unexpired lease.

With these limitations, the addition of these parties to the bankruptcy bargaining table should not cause a significant increase in the cost of Chapter 11. Moreover, the additional costs of hearing these claims does not justify ignoring them in any event.

The most difficult question posed by this Article is how best to address these nonpecuniary interests once we permit them to be heard. I do not fully answer this question in this Article, but instead explore a few of the many options we may have in considering these interests. Although we ultimately may decide to assign a dollar value to what we currently consider to be nonpecuniary interests, and may even decide to elevate them to the status of a bankruptcy "claim," we can start the process of recognizing these interests by merely allowing them to be heard. Once this is accomplished, we can also take these interests into account to the extent they do not interfere with existing pecuniary rights. By hearing these concerns, can we inform ourselves about the implications of Chapter 11 on our society. With this information in hand, we

can make better judgments and decisions and create a more responsive legal process.

Taking substantial noneconomic interests into account in major Chapter 11 cases is also economically efficient, measured over the long term, because it preserves existing social, economic, and familial structures. Purely economic models drastically underestimate the costs of displacement and make other unrealistic assumptions. When these factors are adjusted, it costs less over the long term to consider societal interests now.

In summary, we must recognize, weigh, and take responsibility for the costs bankruptcy imposes on society. These costs must be spread more fairly. We must be willing to neutralize conditions, built into the reorganization system, which disadvantage innocent, noncreditor third parties. This can be done by guaranteeing certain interests, such as employees with a prospect of future employment, a voice in the proceeding. Conversely, a failure to provide this and similar opportunities perpetuates a bankruptcy system that is out of sync with the goals of the society in which it operates. This type of legal system is not sustainable. To a large extent, society pays the costs of rehabilitation. In repayment, the system should be accountable to the public and hear and respond to society's broader needs.

